(28,303)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 348.

JOHN EWEN, PETITIONER,

vs.

AMERICAN FIDELITY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between John Ewen, plaintiff, and American Fidelity Company, defendant, a manifest error hath happened, to the great damage of the said John Ewen, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the judges of the United States Circuit Court of Appeals, for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 22nd day of July, 1920, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

2 Witness, the Honorable Edward D. White, Chief Justice of the United States, this 23rd day of June, in the year of our Lord one thousand nine hundred and twenty and of the independence of the United States the one hundred and forty-fourth.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

J. M. MAYER,
U. S. District Judge.

Summons.

Supreme Court of the State of New York, County of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, August 23rd, 1919.

WILDER, EWEN & PATTERSON,
Plaintiff's Attorneys.

Office and Post Office Address, 45 Cedar Street, Borough of Manhattan, City of New York.

Complaint.

Supreme Court of the State of New York, County of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

The complaint of the plaintiff by Wilder, Ewen & Patterson, his attorneys, respectfully shows and alleges as follows:

First. That at all the times hereinafter mentioned the defendant was and now is an insurance corporation, duly organized and existing under and pursuant to the laws of the State of New York, and that during the month of July, 1915, and theretofore and thereafter, the defendant was duly licensed and authorized to transact fidelity and surety business in the State of New York and was actually so transacting business.

Second. That prior to July 9, 1915, in an action then pending in the New York Supreme Court, Kings County, wherein one David Clinton Mackey was plaintiff, and Illinois Surety Company was defendant, a warrant of attachment had been issued to the sheriff of the County of Kings, and a levy thereunder made upon certain property of the said defendant Illinois Surety Company, and that on July 9, 1915, the defendant herein duly made, executed and delivered its undertaking entitled in the said action, for the purpose of

obtaining the discharge of the said attachment, pursuant to statute in such case made and provided, whereby it undertook in the sum of Seven thousand five hundred dollars ($7,500) that the defendant Illinois Surety Company would on demand pay to the plaintiff David Clinton Mackey the amount of any judgment that might be recovered therein against the defendant not exceeding the sum of Seven thousand five hundred dollars ($7,500), with interest. That the said undertaking was duly filed in the said action in the office of the clerk of the County of Kings, on July 10, 1915, and that proceedings were thereupon had that the said warrant of attachment and levy thereunder were by reason aforesaid discharged and released by order of the Court duly made in the said action, and filed in the office of the clerk thereof, on July 10, 1915.

Third. That thereafter and on or about the 21st day of June, 1919, judgment was duly given in said action in favor of the
5 plaintiff and against the said defendant Illinois Surety Company for the sum of Thirty-seven thousand and forty-one 95/100 ($37,041.95), and that on the said day the plaintiff David Clinton Mackey duly assigned the said judgment to this plaintiff, and also duly assigned to this plaintiff all rights against this defendant American Fidelity Company under the said undertaking given to discharge the attachment and any cause of action or right of action which he then had or might thereafter have against the said defendant American Fidelity Company under the said undertaking.

Fourth. That thereafter and on or about June 23, 1919, this plaintiff duly demanded payment of the said judgment from the said Illinois Surety Company, but that no part thereof has been paid either by the Illinois Surety Company or by the defendant.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Seven thousand five hundred dollars ($7,500) with interest from July 9, 1915, together with the costs and disbursements of this action.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

Office & Post Office Address, 45 Cedar Street, Borough of Manhattan, City of New York.

6 STATE OF NEW YORK,
County of New York, ss:

John Ewen, being duly sworn, deposes and says, that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to those matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN EWEN.

Sworn to before me this 23rd day of August, 1919.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County, No. 84.
New York Register's No. 10067.
Kings County No. 7.
Kings Register No. 134.

7 *Admission of Service.*

State of New York,

Insurance Department.

State of New York,

Supreme Court, County of New York.

County of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

SIR:

Service of the summons and complaint in the above-entitled action is this day admitted on behalf of the American Fidelity Company, Montpelier, Vermont, the above-named defendant, which has filed in this office, under Section 30 of the Insurance Law of the State of New York, a written appointment making the Superintendent of Insurance its true and lawful attorney for service of process.

The fee of Two dollars is hereby acknowledged.

Dated, Albany, N. Y., August 28, 1919.

JESSE S. PHILLIPS,
Superintendent of Insurance.

To: Wilder, Ewen & Patterson, Attorneys for Plaintiff, 45 Cedar Street, New York, N. Y.

This letter was registered at the Albany post office on August 28, 1919, at 3 P. M., by A. Clarke.
Section 30 of Insurance Law endorsed in full on back.

8 *Stipulation.*

Supreme Court, County of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

It is hereby stipulated and agreed that the time for the defendant to serve an answer to the complaint herein be and the same hereby is extended ten days from September 17th to September 27th.

It is further stipulated that the defendant waives any right to amend its answer as of course.

Dated, September 16th, 1919.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

ELKUS, VOGEL, GLEASON & PROSKAUER,
Attorneys for Defendant.

9 *Notice of Appearance.*

Supreme Court, New York County.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

SIR:

Please to take notice, that the defendant hereby appears in the above-entitled action, and that we have been retained as attorneys for it therein, and hereby demand that a copy of all papers in this action be served on us at our office Number 111 Broadway, Borough of Manhattan, City of New York.

Dated, N. Y., Sept. 23, 1919.

Yours, &c.,

ELKUS, VOGEL, GLEASON & PROSKAUER,
Attorneys for Defendant.

Office & Post Office Address, 111 Broadway, Borough of Manhattan, New York City.

To: Wilder, Ewen & Patterson, Esqs., Plaintiff's Attorneys, 45 Cedar Street, Borough of Manhattan, City of New York.

10 *Petition for Removal.*

Supreme Court, New York County.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

To the Honorable the Supreme Court of the State of New York:

The petition of American Fidelity Company respectfully shows:

That it is the defendant herein. That the above-entitled action was commenced on August 28th, 1919. The petitioner appeared herein on September 16th, 1919, by entering into a stipulation extending its time to serve an answer to the complaint herein to September 27th, 1919, a copy of which is hereby annexed as a part hereof.

That this action is of a civil nature at common law and that the said John Ewen is the sole plaintiff, and that your petitioner is the sole defendant in said action. That the matter in dispute in this suit and set forth in the complaint herein is a claim on the part of the plaintiff amounting to the sum of $7,500 with interest thereon from July 9th, 1915, arising out of the execution by the petitioner of an undertaking to discharge an attachment in an action brought by one David Clinton Mackey, as plaintiff, against the Illinois Surety Company, as defendant, in the Supreme Court, Kings County, in which action the plaintiff therein recovered a judgment
11 against the defendant therein on June 21st, 1919, for $37,041.95, which judgment was subsequently assigned to the plaintiff herein.

That the matter in dispute herein exceeds, exclusive of interest or costs, the sum of $3,000.

Your petitioner further says and alleges that the said plaintiff, John Ewen, was at the commencement of this said suit and at all times since has been, and now is, a citizen and resident of the State of New York and resides in the Borough of Manhattan, City of New York and in the Southern District of New York, and that the defendant, your petitioner, was at the commencement of said suit and at all times since has been, and now is, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Vermont, and was at the time of the commencement of said suit, and at all times since has been, and now is, a citizen and resident of the said State of Vermont, and not a citizen or resident of the State of New York.

That said action is now pending and undetermined. That said action is wholly between citizens of different states and that said parties plaintiff and defendant are actually interested in the controversy herein. That the time within which the defendant herein is required by the laws of the State of New York or the rule of your

honorable Court to answer to the complaint of the plaintiff has not expired, and will not expire until September 27th, 1919, and that the defendant, your petitioner, desires to remove said suit from your honorable Court to the District Court of the United States for the Southern District of New York according to the provisions of the Act of Congress of the United States in that behalf made and provided. Your petitioner has not answered or pleaded herein.

12 On September 23rd, 1919, your petitioner served its notice of appearance herein, a copy of which is hereto annexed as a part hereof. That the time appointed for hearing the next Trial Term of this court where the above action is triable is October 6th, 1919.

And your petitioner files and offers herein its bond with good and sufficient surety conditioned as required by the Act of Congress in that behalf made and provided for entering in the District Court of the United States for the Southern District of New York within thirty days from the date of the filing of this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court if said court shall hold that this suit was wrongfully or improperly removed thereto, and also for the defendant's appearing and entering special bail in said suit if special bail was originally required therein, pursuant to the statute of the United States in such case made and provided.

And your petitioner therefore prays that the said bond may be accepted as good and sufficient and that this honorable Court will make its order for the removal of said cause into the District Court of the United States for the Southern District of New York in which district this suit is pending and cause the record herein to be removed into said District Court of the United States, and that no further proceeding may be had in the said cause in this court.

And your petitioner will ever pray.

[Seal of the American Fidelity Company.]

AMERICAN FIDELITY COMPANY,
By L. D. TAFT.

13 UNITED STATES OF AMERICA,
State of Vermont,
County of Washington:

L. D. Taft, being duly sworn, deposes and says: that he is the vice president of the American Fidelity Company, the petitioner herein. That the foregoing petition is true to the knowledge of this deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the ground of deponent's belief as to all matters in said petition not stated therein to be alleged upon his knowledge are investigations deponent has caused to be made and reports received by him concerning the subject-matter of this action and information acquired by him in the course of his duties as an officer of the defendant in this action; and that the reason why this verification is made by de-

ponent instead of by said defendent is that the defendant is a corporation.

L. D. TAFT.

Sworn to before me this 24th day of September, 1919.
IRENE CARPENTER,
[Notary Seal.] *Notary Public.*

STATE OF VERMONT:

Washington County Clerk's Office.

I, Lewis C. Moody, Clerk of the said County and of the Courts of Record thereof, do hereby certify that Irene H. Carpenter, whose name is subscribed, in her own proper handwriting, to the foregoing certificate, was at the date thereof an acting Notary
14 Public within and for the County aforesaid, dwelling therein, duly commissioned and qualified by the laws of the State, to administer oaths for general purposes, to take depositions and acknowledgments of deeds, and other written instruments; and that to her official acts and attestations full faith and credit are and ought to be given; that I am well acquainted with the handwriting of the said Notary and verily believe that the signature attached to the foregoing certificate is his genuine signature. And further, that the foregoing instrument is executed and acknowledged according to the laws of Vermont.

In testimony whereof, I have hereunto set my hand and affixed the seal of the County Court at Montpelier, in said County, this 24th day of September, A. D., 1919.

[Seal of Office of Washington County Clerk, Vermont.]

LEWIS C. MOODY,
Clerk.

Annexed to the foregoing petition were copies of the summons and complaint, stipulation extending time to answer and defendant's notice of appearance, which have been heretofore printed in full. The printing of the same in full is omitted by consent.

15 *Notice of Entry and Filing.*

SIR:

Please take notice that the within is a copy of a petition this day duly entered and filed in the within entitled action in the office of the Clerk of the within named Court and County of New York.

Dated, New York, September 27th, 1919.

Yours, &c., ELKUS, VOGEL, GLEASON & PROSKAUER,
Attorneys for Defendant.

11 Broadway, Borough of Manhattan, New York City.

To: Wilder, Ewen & Patterson, Attorneys for Plaintiff.

Notice of Presentation of Petition, Annexed to Petition for Removal.

SIRS:

Please take notice that the within petition will be presented to one of the Justices of the New York Supreme Court, held in and for the County of New York, at a Special Term, Part II thereof, to be held at the County Court House, in the Borough of Manhattan, City of New York, on the 27th day of September, 1919, at 10:30 o'clock in the forenoon of that day, and that said petition will thereupon be filed in the office of the Clerk of said Court and of the County of New York on September 27th, 1919.

Dated, New York, September 25th, 1919.

Yours, etc.,

ELKUS, VOGEL, GLEASON & PROSKAUER,
Attorneys for Defendant.

111 Broadway, New York City.

16 To: Wilder, Ewen & Patterson, Plaintiff's Attorneys, 45 Cedar Street, N. Y. City.

Admission of due service of the petition for removal and notice of presentation by the defendant's attorneys was endorsed on the petition which was marked "Filed Sept. 27, 1919."

Bond on Removal (Summarized).

Removal bond executed by the defendant as principal, and National Surety Company as surety, dated September 23, 1919, in the usual form, approved by Hon. Irving Lehman, a Justice of the Supreme Court, filed September 27, 1919, and endorsed thereon due notice signed by defendant and addressed to plaintiff's attorneys, giving notice of presentment for approval, and filing, with due admission of service by the defendant's attorneys, and file mark showing its filing in the office of the Clerk of the County of New York, on Sept. 27, 1919. Printing in full is omitted by consent.

17 *County Clerk's Certificate on Removal Papers.*

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of said County, and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the preceding with the original Record on Removal to U. S. Court with bond and approval endorsed thereon, John Ewen, Plaintiff, against American Fidelity Company, Defendant, on file

in my office and that the same are correct transcripts therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 29th day of September, 1919.

[SEAL.] WM. F. SCHNEIDER,
Clerk.

18 *Answer.*

United States District Court. Southern District of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

Defendant, by its attorneys, Elkus, Vogel, Gleason & Proskauer, answering the complaint herein, alleges:

I. Denies that defendant is now or ever was organized and existing under and pursuant to the Laws of the State of New York, and admits each and every other allegation contained in paragraph "First" of the complaint.

II. On information and belief, denies that David Clinton Mackey on or about the 21st day of June, 1919, duly recovered judgment against the Illinois Surety Company for any amount; and denies that defendant has any knowledge or information thereof sufficient to form a belief as to each and every other allegation contained in paragraph "Third" of the complaint.

III. Denies that defendant has any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph "Fourth" of the complaint.

19 As a first separate defense, defendant alleges:

IV. The Illinois Surety Company was an insurance corporation, and an insurance company, organized and existing under the Laws of the State of Illinois, and having its principal office for the transaction of business in the City of Chicago, State of Illinois.

V. That on April 19th, 1916, by an order of the Superior Court of Cook County, Illinois, a court of general jurisdiction, a general receiver was duly appointed for the Illinois Surety Company to take possession of its assets and liquidate its affairs and, by said order the Illinois Surety Company was finally ordered and decreed to cease transacting business; and the receiver so appointed on April 19th, 1916, took possession of the assets and affairs of the Illinois Surety Company to liquidate the same, and has ever since been and now is in possession of and liquidating the same, and the Illinois Surety Company on April 19th, 1916, both pursuant to said order and also to a prior preliminary order, and because of the possession and

liquidation by said receiver, ceased to transact any business, and has not since transacted any business. A copy of said order appointing said receiver is annexed hereto as Exhibit A.

VI. That by Chapter 73, Section 13, of the revised statutes of the State of Illinois in force at all times mentioned herein, entitled the "Insurance Law" of Illinois, and forming a part of the existence and charter of the Illinois Surety Co., said insurance corporation became dissolved and its charter and existence ceased, determined and became extinct one year from the date when it ceased to transact business as aforesaid, to wit, on April 19th, 1917. Chapter
20 73, Sections 13 and 14 of the revised statutes of Illinois, which were in force at all times mentioned herein, provide:

"13. The charters of all insurance companies incorporated in this State, which either from neglect or by vote of their members or officers, or in obedience to the decree of any court, have ceased or shall hereafter cease, for the period of one year, to transact the business for which they were organized, shall be deemed and held extinct in all respects, as if they had expired by their own limitation; and the circuit courts shall have authority, upon application, by the petition of the auditor of state, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns; Provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors.

"14. Insurance companies whose charters expire by their own limitation, or become forfeited by non-user, or are dissolved by decree of Court, or otherwise, shall nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized."

VII. The Illinois Surety Company was an insurance company within the meaning of the aforesaid Sections 13 and 14, of Chapter 73 of the revised statutes of Illinois.

VIII. That by the law of the State of its incorporation,
21 which formed a part of its charter and existence, and was a feature of its existence which it carried with it in the other states, the life and existence of the Illinois Surety Company was extended for two years and no more from April 19th, 1917, or until April 19th, 1919, for the purpose of prosecuting and defending suits by and against it, and on April 19th, 1919, it ceased and determined for all purposes.

IX. That the action brought by David Clinton Mackey against the Illinois Surety Company in the New York Supreme Court of Kings County, abated when the Illinois Surety Company was dissolved and its existence ceased and determined, and jurisdiction

over the Illinois Surety Company in said action ceased and determined at the same time that its charter and existence ceased and determined. That said action was not revived by bringing in the receiver of the Illinois Surety Company or other successor in interest as a party defendant. That judgment against the Illinois Surety Company, after its decease, was taken in said action ex parte and by default on June 21st, 1919. That said judgment was entered on a report of a referee before whom the defendant in said action made no appearance. That the order of reference to said referee is dated May 1st, 1919, and was obtained ex parte after said corporation ceased to exist.

X. That on April 18th, 1919, at the end of the period of two years during which the existence of the Illinois Surety Company was extended by statute for the purpose of prosecuting and defending suits, an order was entered in the Superior Court of Cook County, Illinois, directing the receiver not to defend said action brought by David Clinton Mackey against the Illinois Surety Company in the New York Supreme Court of Kings County, and directing that David Clinton Mackey file his claims before Sidney S.
22 Pollack, Master in Chancery in said Court, like all other claimants were required to file their claims. A copy of said order is annexed hereto as Exhibit B. On information and belief that said David Clinton Mackey was duly served with notice of the application for, and the entry of, said order.

XI. That the Superior Court of Cook County, Illinois, referred to Sidney S. Pollack, Master in Chancery of said Court, to hear and determine and report his conclusions of law and fact, all claims disallowed by the receiver, and all claims that were the subject of actions pending against the Illinois Surety Company or against the Illinois Surety Company and the receiver jointly in all the courts of the different states of the United States, as is shown by the order of said Court, dated January 30th, 1918, a copy of which is annexed hereto as Exhibit C. On information and belief that David Clinton Mackey, the assignor of the plaintiff herein had due notice of the application for, and entry of, said order of reference.

XII. That the action brought by David Clinton Mackey against the Illinois Surety Company alleged in paragraph "Second" of the complaint, was begun on or about May 11th, 1915, and was action number 2, or the second action, of two actions which were brought by said Mackey in the Supreme Court of Kings County, against the Illinois Surety Company to recover an alleged balance of commissions alleged to be due under certain contracts whereby said Mackey acted as agent or broker for the Illinois Surety Company, in procuring the application for bonds to be written by the Illinois Surety Company and delivered to various obligees in New York. On information and belief that both of said actions were begun shortly after said Mackey had been indicted by the Grand
23 Jury of New York County for misappropriating property received by said Mackey for the account of the Illinois

Surety Co. to indemnify it against losses sustained on bonds written and issued by it at the instance and procurement of said Mackey, as agent or broker. That in Action Number 1 of said actions said Mackey sued to recover $75,000.00, and in said Action Number 2, he sued to recover $23,000.00. That the claims made in Action Number 2 were made under the same contracts as the claims made in Action Number 1, and both were for commissions claimed to be due. That the Illinois Surety Co. interposed an answer in each of said actions which set up as a defense and also as a counterclaim, claims for premiums and moneys, and for securities received by said Mackey and converted and not accounted for, and for rebates amounting in all to $155,914.56.

XIII. That David Clinton Mackey used no reasonable diligence to bring said actions on for trial until after he and his attorneys received a copy of the order of the Superior Court of Cook County, Illinois, dated April 18th, 1919, which ordered the receiver of the Illinois Surety Co. not to defend said actions against the Illinois Surety Co., and referred said actions to a Master in Chancery, a copy of which order is Exhibit A herein. That on April 28th, 1919, Messrs. Kellogg & Rose, attorneys who had previously appeared for the Illinois Surety Company in said actions served notice on said Mackey that they no longer were authorized to appear or to receive notice for the Illinois Surety Company in said actions or otherwise. That thereafter said Mackey and his attorneys in said actions obtained ex parte orders dated May 1st, 1919, referring said actions to James MacGregor Smith, Esq. to hear and report his conclusions of fact and law, and thereafter the plaintiff in said actions held one or more ex parte hearings before said referee, and ob-
24 tained ex parte reports dated June 9th, 1919, from said referee in each of said actions, and on such reports has caused to be entered an ex parte judgment in said Action Number 2 for $37,041.95, on or about June 21st, 1919; and in said Action Number 1, caused to be entered an ex parte judgment for $21,584.99, on or about the same date. That said judgments are void and were entered without jurisdiction over the defendant, the Illinois Surety Company, which had been previously dissolved and had ceased to exist when said order of reference and hearings and judgment were entered as aforesaid.

Wherefore, defendant demands that the complaint be dismissed with costs.

ELKUS, VOGEL, GLEASON & PROSKAUER,
Attorneys for Defendant.

Office & Post Office Address, #111 Broadway, Borough of Manhattan, New York City.

25 EXHIBIT A.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County, Illinois.

Gen. No. —.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Decree in Bill and Petition for Dissolution and Receivership.

This cause again coming on to be heard for the appointment of a receiver on the sworn bill and petition filed herein since the entering of the order restraining and enjoining and forbidding said Illinois Surety Company from further prosecution of its business, and oral proof offered in support of the averments of said bill and petition, and the answer thereunto of the defendant, the Illinois Surety Company, admitting that all the material allegations and averments of said bill and petition are true, and the petitioners appearing by A. J. Hopkins, their solicitor, and the defendant, the Illinois Surety Company, appearing by H. C. Davis, its solicitor, and the Court being fully advised in the premises, doth order, adjudge and decree that James S. Hopkins, of Chicago, Illinois, be, and he is, hereby constituted and appointed receiver of the said Illinois Surety Company, and of all and singular the real estate, per-

26 sonalty, choses in action, bonds, bills, notes, securities, evidences of indebtedness, books, records, moneys, checks, drafts, and other property and assets of every nature real and personal of and belonging to the said Illinois Surety Company, or in any manner held in trust for, or subject to the control of said defendant, including such securities as may be deposited with the Superintendent of Insurance of the State of Illinois, with the treasurer of the State of Alabama, with the Internal Revenue Collector in Panama of the Isthmian Canal Zone, or with the Commissioner of Insurance or Treasurer of the State of Virginia, with power to take possession of all such assets of every name and nature whatsoever, real and personal, and to institute any and all necessary proceedings or actions, to recover the same, either at law or in equity, with power to prosecut and defend suits in the name of the Illinois Surety Company, or in his own name, to appoint agents under him, and an attorney or attorneys to prosecute and defend suits and perform all other service necessary for the successful carrying out of said receivership, and to appoint agents under him and to do all other acts necessary for the collection, marshalling and distributing of the assets of the said Illinois Surety Company, and the closing of its concerns.

2. That the said James S. Hopkins, as receiver as aforesaid give bond for the faithful performance of his duty as such receiver, in the penal sum of Two hundred thousand ($200,000 00) dollars, and with a surety or sureties to be approved by the Court.

3. That the said receiver shall, and he is, hereby given leave to apply to this Court for such further orders and directions as equity and justice and the rules of this Court require in relation to and concerning the collection, marshalling and distributing of the
27 assets of said Illinois Surety Company, and the closing of its concerns for all which purposes jurisdiction is hereby expressly retained until final hearing and settlement thereafter of all unfinished business of said Illinois Surety Company, and the receivership herein.

4. The said receiver shall have all the usual powers and duties of receivers in chancery. On due notice to said defendant, Illinois Surety Company, and on full hearing good cause being shown, said complainants are hereby excused from giving a bond as a condition to the appointment of a receiver herein.

(Entry.)

CHARLES M. FOELL,
Judge.

EXHIBIT B.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County, Illinois.

No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Order.

The petition of James S. Hopkins, Receiver of the Illinois Surety Company coming on to be heard, and it appearing to the Court that all persons who are entitled to receive notice of said petition
28 and application to this court, as provided in said petition, have been duly notified, and it appearing to the Court that the interests of the creditors of the Illinois Surety Company will be best subserved by directing the receiver to take no further action relating to either of the cases mentioned and to require said Mackey to file his claim before Sidney S. Pollack, Master in Chancery of this Court like all other claimants are required to file under the order of this Court under date of January 30, 1918, if he desires to participate in the assets of said Illinois Surety Company.

Now, therefore, the said receiver, James S. Hopkins, is hereby

directed to discontinue any further defense in either of said cases wherein said David Clinton Mackey is plaintiff and the Illinois Surety Company is defendant, now pending in the Supreme Court of Kings County, State of New York, and he is hereby directed to notify said Mackey of the said order of this Court of January 30, 1918, and of this order either by a letter through the United States mails or by a notice personally served upon said Mackey.

The said order of January 30, 1918, is hereby modified as respects the said two cases by allowing said Mackey sixty (60) days from the date of this order to file before said Master in Chancery Sidney S. Pollack any claim or claims that he has against the Illinois Surety Company that are represented in said suits or either of them.

Dated, this 18th day of April, 1919.

Enter,

DENIS E. SULLIVAN,
Judge.

29 EXHIBIT C.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Order.

Whereas, the report of James S. Hopkins, as Receiver of the Illinois Surety Company filed in this Court on January 15, 1918, discloses the fact that there is a large number of cases pending against the Illinois Surety Company in the various courts of the different States in which the Illinois Surety Company did business while it was a going concern, and that in a number of these cases the Receiver of this Court, James S. Hopkins, has been made party defendant by said claimants with the said Illinois Surety Company without the authority of this Court, and that said suits are now all undetermined in said courts, and,

Whereas, this Court did on the 30th day of January, 1918, enter an order that all claims against the Illinois Surety Company, including all such claims as are pending against the Illinois Surety Company in the various courts of the different states, and such suits as are pending against the Illinois Surety Company and the Receiver of this court jointly, were referred to Sidney S. Pol-

30 lack, Master in Chancery of this court, to hear and determine on proper evidence adduced by such claimants, and report his conclusions of law and fact under the evidence taken by him in

all of said matters to this Court within Sixty (60) days from the date of said order.

Now, therefore, the said Receiver, James S. Hopkins, is hereby directed to discontinue any expense in defense of any of such suits so pending that have been commenced against the Illinois Surety Company and against the Illinois Surety Company and him as Receiver of said Illinois Surety Company in any of the courts in any of the states in which said company was doing business while it was a going concern, and is not authorized to employ attorneys or pay any expenses from this date in defense of any of such suits and said Receiver is hereby directed to notify all such claimants or their attorneys of this order by sending to such claimants or their attorneys through the United States mails to their last known place of business or residence a printed copy of this order.

It is further ordered and directed that all claimants in any of said suits referred to in this order who fail or neglect to file their claims with Sidney S. Pollack, Master in Chancery of this court, within the time limited in said order and duly prosecute the same in accordance with the terms of said order shall be barred from participating in any dividends derived from the property and assets of the Illinois Surety Company now in the possession and control of this Court through its said Receiver, James S. Hopkins.

Dated this 30th day of January, A. D. 1918.

Enter,

DENIS E. SULLIVAN,
Judge.

31 UNITED STATES OF AMERICA,
State of Vermont,
County of Washington, ss:

B. B. Bailey, being duly sworn, says: That he is the vice president of American Fidelity Company, the corporation defendant in this action.

That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by said defendant is that it is a foreign corporation.

That the sources of deponent's information and the grounds of his belief as to all matters not therein stated to be alleged upon his knowledge, are investigations and reports he has caused to be made by employees of the said corporation and information acquired by him in the performance of his duties as an officer of the said corporation.

B. B. BAILEY.

Sworn to before me, this 25th day of October, 1919.

[SEAL.] IRENE H. CARPENTER,
Notary Public.

32 STATE OF VERMONT,
Washington County Clerk's Office.

I, Joseph G. Frattini, deputy clerk of the said county and of the Courts of Record thereof, do hereby certify that Irene H. Carpenter, Esq., whose name is subscribed in her own proper handwriting, to the foregoing certificate, was at the date thereof an acting notary public within and for the county aforesaid, dwelling therein, duly commissioned and qualified by the laws of the state, to administer oaths for general purposes, to take depositions and acknowledgment of deeds, and other written instruments; and that to his official acts and attestations full faith and credit are and ought to be given; that I am well acquainted with the handwriting of the said notary and verily believe that the signature attached to the foregoing certificate is his genuine signature. And further that the foregoing instrument is executed and acknowledged according to the laws of Vermont.

In testimony whereof, I have hereunto set my hand and affixed the seal of the County Court at Montpelier in said county, this 25th day of October, A. D. 1919.

[State Seal.] JOSEPH G. FRATTINI,
Deputy Clerk.

33 *Order of Substitution.*

At a term of the U. S. District Court, Southern District of N. Y. Held at the Court House Thereof, in the City and County of New York, on the 22nd Day of December, 1919.

Present: Hon. Julius M. Mayer, Judge.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

On reading and filing the annexed consent and on motion of Gleason, Vogel & Proskauer, it is hereby

Ordered, that Gleason, Vogel & Proskauer, of No. 111 Broadway, Borough of Manhattan, City of New York, be and they hereby are substituted in the place and stead of Elkus, Vogel, Gleason & Proskauer, as attorneys for the defendant in the above entitled action.

J. M. MAYER,
U. S. D. J.

34 *Extract from U. S. Clerk's Minutes.*

At a Stated Term of the District Court of the United States for the Southern District of New York Held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of March, in the Year of our Lord One Thousand Nine Hundred and Twenty.

Present: Honorable Edward E. Cushman, District Judge.

20–380.

JOHN EWEN

against

AMERICAN FIDELITY COMPANY.

Now, comes the plaintiff by Messrs. Wilder, Ewen & Patterson by Mr. William R. Wilder and John Ewen, of counsel, and move the trial of this cause. Likewise comes the defendant, by Messrs. Gleason, Vogel & Proskauer by Mr. Joseph M. Proskauer, of counsel. It is stipulated in open court by the counsel that the case be tried with one juror.

Thereupon a juror was duly sworn and the cause proceeded to trial.

Thereafter on the 26th day of March, 1920, after hearing the evidence for the respective parties and the arguments of counsel, the juror by direction of the Court, finds a verdict in favor of the defendant.

Mr. Wilder on behalf of the plaintiff moves to set the verdict aside.

Motion denied.

An extract from the minutes.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

35 *Order Denying Motion for New Trial.*

At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the General Post Office Building in the City, County, and State of New York, on the 29th Day of March, 1920.

Present: Hon. Edward E. Cushman, District Judge.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

The above-entitled action having been duly tried before Judge Cushman and a jury at a stated term of this court, on the 25th and

26th days of March, 1920, and the jury having rendered a verdict in favor of the defendant and against the plaintiff herein, by direction of the Court, and a motion to set aside the verdict and for a new trial having been made by the plaintiff upon the Judge's minutes and on the grounds that the verdict was contrary to the evidence, contrary to the law and against the weight of the evidence.

Now, after hearing William R. Wilder, Esq., of counsel for the plaintiff in support of the said motion, and Joseph M. Proskauer, Esq., of counsel for the defendant, in opposition thereto, and due deliberation having been had thereon, it is hereby

Ordered, that the said motion be and the same hereby is in all respects denied.

EDWARD E. CUSHMAN,
U. S. D. J.

36 *Judgment.*

United States District Court, Southern District of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

The issues in the above-entitled action having been duly brought on for trial before Judge Edward E. Cushman, and a jury at a stated term of this court, held in and for the Southern District of New York, at the General Post Office Building in the City, County and State of New York, on the 25th day of March, 1920, and the plaintiff having appeared by William R. Wilder, Esq., his counsel, and the defendant having appeared by Joseph M. Proskauer, Esq., its counsel, and the issues in the above-entitled action having been duly tried on the 25th and 26th days of March, 1920, and the jury having rendered a verdict in favor of the defendant and against the plaintiff herein, by direction of the Court, and the costs of the defendant having been duly adjusted by the clerk of this court at the sum of $68.60,

Now, on motion of Gleason, Vogel & Proskauer, attorneys for the defendant herein, it is hereby

Ordered and adjudged, that the American Fidelity Company, the above-named defendant, have judgment against John Ewen, the above-named plaintiff, on the merits and that the said defendant recover of the said plaintiff the sum of $68.60, costs as taxed, and that it have execution therefor.

Judgment signed and entered this 29th day of March, 1920.

ALEX. GILCHRIST, JR.,
Clerk.

37 *Bill of Exceptions.*

United States District Court, Southern District of New York.

JOHN EWEN, Plaintiff,

vs.

AMERICAN FIDELITY COMPANY, Defendant.

At a Term of the United States District Court for the Southern District of New York, held at its Court Rooms in the Post Office Building in said County of New York, before Hon. Edward E. Cushman, District Judge, on the 25th and 26th days of March, 1920, the issues joined by the parties herein upon the pleadings came on to be tried before the Court and a jury for that purpose duly impaneled. And on said day came there as well John Ewen, by William R. Wilder and John Ewen, as counsel, and the American Fidelity Company by Joseph M. Proskauer, its counsel; and the jurors for that purpose duly impaneled, to try the said issues being called also came then and were then and there in due manner chosen and sworn to try the said issues and then and there the trial proceeded as follows:

New York, March 25, 1920.

Appearances:

Wilder, Ewen & Patterson, attorneys for plaintiff. William R. Wilder and John Ewen, of counsel.

38 Gleason, Vogel & Proskauer, attorneys for defendant. Joseph M. Proskauer, of counsel.

By consent of counsel a jury of one was impaneled and sworn.

Afternoon Session.

Mr. Wilder: Before entering upon the trial of the action, if your Honor please, I make a motion to strike out and expunge from the record as irrelevant, scandalous, scurrilous and defamatory, an allegation which your Honor will find at folio 18 of the answer.

The Court: At what page?

Mr. Wilder: Folio 18. I have taken the liberty of indicating it there in parenthesis. It reads as follows: "On information and belief, that both of said actions were begun shortly after said Mackey had been indicted by the Grand Jury of New York County for misappropriating property received by said Mackey for the account of the Illinois Surety Company, to indemnify it against losses sustained on bonds written by it at the instance and procurement of said Mackey as agent and broker." That is no defense to the action on the bond on any possible theory, and, furthermore, the indictment was procured after Mackey had been trying for months to get a settlement of the account; and on the very day one of the two actions was

begun and long, long before this answer in this action was interposed, the other side must have known, and it was a matter of record in this county that that indictment had been dismissed by the District Attorney on his own motion; and it seems so unnecessary in a formal action of this kind to have this echo of the feud that existed between Senator Hopkins, who is the Receiver of the Illinois Surety Company, and Mr. Mackey, who was a very successful agent here and had written hundreds of thousands of bonds. He was trying to collect his money and Hopkins was mad and tried to scare him from bringing his suit by indicting him.

39

The Court: What is the purpose of that?

Mr. Wilder: I do not see the purpose of it at all.

Mr. Proskauer: Your Honor, I did not prepare this answer. I do not see that it has any materiality at all, but I do not want it stricken out as scandalous or anything else. I am not familiar with the circumstances which led to its inclusion, but for the purpose of this trial I consent that it be stricken out as irrelevant.

The Court: It will be stricken out.

Mr. Wilder: I offer in evidence a judgment recovered in the Supreme Court of the State of New York, County of Kings, in an action brought by David Clinton Mackey against the Illinois Surety Company, in what is known as Action No. 2. It was in that action that the American Fidelity Company, the defendant in this action, gave the bond on which the suit is brought. The amount of the judgment, I think, is $37,041.95.

The Court: That is one of the judgments that is claimed to have been rendered after the termination of the defendant's powers?

Mr. Wilder: Yes. I think that is probably right. That is the claim made by the defendant.

Mr. Proskauer: Exactly.

Mr. Wilder: Though we shall, of course, contend that the defendant was powerful enough to have judgments entered against it, whether we are powerful enough to collect them or not.

The Court: I understand.

Mr. Proskauer: I make no question, if your Honor please, as to the authenticity of the judgment roll. Merely to preserve my record I object to its admission in evidence as incompetent, irrelevant, immaterial, and specifically on the ground that it is not shown that the Illinois Surety Company was in existence at the time the judgment was rendered.

40

The Court: I overrule the objection for the purpose of getting everything before the Court, but in the decision that I find the question will have to be reserved.

Mr. Proskauer: I quite realize that, your Honor, but I only make the objection to preserve my record.

The Court: Yes. Exception allowed.

Mr. Wilder: In order that the record may be definite, I will state that judgment was entered on June 21, 1919, and I offer the judgment roll in evidence.

The Court: That will be admitted.

Mr. Wilder: The summons in the action is dated May 11th, 1915.

Mr. Ewen: The notice of appearance by Nelson R. Keach, as attorney for the defendant, Illinois Surety Company, is dated May 21, 1915. There is an amended complaint, verified November 28, 1917; there is an order substituting Messrs. Kellogg & Rose as attorneys for the defendant in place of Nelson R. Keach, entered February 23, 1917, with the consent attached. There is an answer to the amended and supplemental complaint, verified December 20, 1917, a reply to the answer to the amended and supplemental complaint, verified January 15, 1918; notice of trial, dated September 15, 1918—served by the plaintiff. There is an order for bill of particulars entered August 26, 1915. There is an order entered November 21st, 1917, providing for the service of an amended and supplemental complaint, answer and reply and referring the issues to Wilbur Larremore, Esq., as Referee, and containing other provisions that are not material. Attached to that is a consent dated November 14, 1917, signed by the attorneys for the plaintiff, the attorneys for the defendant,
41 and the American Fidelity Company, surety on the bond given to release the attachment. There is a notice of trial dated May 8, 1919. There is an order dated May 1, 1919, referring the issues to James McGregor Smith as Referee in place of Wilbur Larremore, the Referee theretofore appointed, who has since died.

Mr. Proskauer: Just to preserve the continuity, may it appear on the record for your Honor's convenience that the order which was entered on May 1, 1919, recites that no one appeared in opposition.

Mr. Ewen: No objection.

Mr. Proskauer: That is, nobody appeared for the Illinois Surety Company on the entry of that order. The relevance of that will appear hereafter.

Mr. Ewen: This order also recites the service of the notice of application on the attorneys for the defendants. There is a certificate of the Referee as to his fees, dated June 20, 1919. There is a Referee's oath, dated May 7, 1919, a Referee's report dated June 9, 1919, and the judgment entered June 21, 1919.

I also offer in evidence a paper that does not seem to have been attached to the judgment roll, but it is the affidavit and notice of motion to appoint a Referee in place of Mr. Larremore, deceased, dated April 25, 1919, with an affidavit attached, and proof of service on Kellogg & Rose, defendant's attorneys, on April 26, 1919, also produced by the County Clerk.

The Court: This date when the defense claims the last spark of life went out of this corporation, what is that date?

Mr. Proskauer: That is prior to this April 26, 1919.

Mr. Ewen: That is it.

The Court: Prior to the date of that service on Kellogg & Rose.

42 Mr. Ewen: That is their claim, sir.

The Court: That is what I am saying. The above papers offered by the plaintiff were considered as marked in evidence as Plaintiff's Exhibits I and II not physically marked, being public records.

Mr. Ewen: Then we offer also from the records of the County

Clerk's office assignment of the judgment to the plaintiff in this action, also assignment of Mr. Mackey's rights and all rights under the bond given to discharge the attachment filed June 21, 1919.

The Court: Admitted.

Marked Plaintiff's Exhibits III and IV.

Mr. Ewen: Then I offer in evidence demand dated June 23, 1919, directed to the Illinois Surety Company and signed by the plaintiff in this action, demanding payment of the judgment recovered in Mackey against Illinois Surety Company, Action No. 2, together with affidavits of service by Rudolph Dugan, dated December 16, 1919, service on Kellogg & Rose, the defendant's attorneys; affidavit of Elizabeth Sinnott, verified December 17, 1919, as to mailing of a copy of the demand addressed to the Illinois Surety Company, care of A. J. Hopkins, 134 La Salle Street, Chicago, and affidavit of Elizabeth Sinnott, verified December 17, 1919, of the mailing of a copy of the demand addressed to the Illinois Surety Company, care of James S. Hopkins, receiver.

Mr. Proskauer: I consent that the affidavit of service be taken as though it were the testimony of the witness and make no objection on that ground, but I make the general objection that it is incompetent, irrelevant and immaterial along the line of my previous objection.

The Court: It will be received. Objection overruled.

Mr. Proskauer: Exception.

Marked Plaintiff's Exhibit V.

43 JOHN EWEN, called as a witness on behalf of the plaintiff being duly sworn, testified as follows:

Direct examination.

By Mr. Wilder:

I am the plaintiff in this action. I am a lawyer and reside at Spuyten Duyvil, New York City. My place of business is 45 Cedar Street. I am the assignee of the claim of one Mackey, originally had against the Illinois Surety Company. I know Mr. Mackey and have known him fifteen years. He was a client of mine or my firm, Wilder, Ewen & Patterson, in 1915.

Q. State what action or actions you brought at his instance against the Illinois Surety Company and their history?

A. The two actions that you refer to, presumably the actions brought by Mr. Mackey against the Illinois Surety Company, to recover commissions on premiums on bonds which had been executed by him during his agency for the Illinois Surety Company, the first action known as Action No. 1, I did not initiate; we appeared in that action after the action had been brought, but before answer had been served. In that action before service of the answer the Illinois Surety Company filed a bond and petitioned for removal to the United States

District Court for some district in Illinois. That action was commenced in December, 1914.

After the petition had been filed—it was filed ex parte and bond approved—I made an application to have the approval of the bond set aside in the Supreme Court of Kings County where the action was pending. That motion was denied and appeal was taken to the Appellate Division. The Appellate Division held up its decision for about a year, I should say. In the meantime the Illinois Surety Company in Illinois started to bring the action on for trial in the United States Court, and I accordingly retained counsel in
44 Illinois and had a motion for a remand made, which was granted. The case was remanded to the Supreme Court in Kings County and the defendant was then in default and, as a condition to opening the default, the Court required a consent to a reference before Mr. Wilbur Larremore, as Referee. The reference was brought on and continued. I can tell the date if you will let me have the papers.

Mr. Proskauer: Mr. Ewen, that was not in this action, it was in the Action No. 1, was it not?

The Witness: Yes. Well, I say briefly, then the reference was continued almost continuously down to August, July or August, 1918, at which time it was submitted. The first action was brought to recover the commissions on premiums that were received by the company after the termination of the agency. The first action covered premiums received up to the date on which it was brought, which was December, 1914. The second action, which was Action No. 2, and the action which is involved in this suit, was commenced about a year after, in 1915. That case came on the calendar for trial, we answered ready, Kellogg & Rose, who appeared in it asked that it be referred to Mr. Larremore with the other action. We agreed to do that.

By Mr. Proskauer:

Q. Would you give the date of that?

A. It was marked off the calendar.

Q. Give the approximate date when they asked that consent?

A. I will if you let me have the file papers.

Q. Mr. Ewen, the order of reference was entered on November 21, 1917, on a consent signed in November 14, 1917.

A. It appeared on October 9, 1916, and was marked off at
45 that time, with the understanding that we should have it referred to Mr. Larremore as referee. I made various attempts to have a stipulation signed referring it with the other action, but probably more due to the form than anything else we were not able to agree, and I made a motion in October, 1917, to have it restored to the calendar for trial. That motion was granted by an order made on October 19th. The case was about to go on for trial and Mr. Kellogg moved to have it stayed, and at that time we entered into an agreement to have it referred with the other case to Mr. Larremore.

The Court: We have not got that date yet.

Mr. Proskauer: For convenience, if there be no objection, I will read into the record that the consent to the order of reference was dated November 14, 1917, and that the order of reference was made November 21, 1917. But I move to strike out——

The Witness: The order was dated November 21, 1917.

Mr. Proskauer: One moment, please. I move to strike out as a conclusion, as incompetent, irrelevant and immaterial, that there was a consent that it be referred with the other cases. There is not anything of that sort in the record.

The Witness: All right, I will leave out the other case, then.

The Court: It was referred to the same referee?

The Witness: It was referred to the same referee. We then served notice of hearing bfore Mr. Larremore, and it came up before him for a hearing at the same time with the other case which was pending before him. We then entered into a stipulation
46 on the record that the testimony in Action No. 1 already taken and thereafter to be taken, should be deemed testimony in Action 2 so far as applicable, and that testimony taken in Action No. 2 should be deemed the testimony in Action No. 1, so far as applicable, and after that the two cases went on trial together. The main issues were the same, the counterclaim was the same in both; the only difference was we were adding on——

Mr. Proskauer: I must object to that, your Honor. I object to the statement of the witness that the issues were the same, or the counterclaim was the same, as being a conclusion.

The Court: The pleadings are in evidence.

Mr. Wilder: The pleadings are here, there is no question about it, because we both attended on the trial. This is simply to overcome their contention that there was any unnecessary delay here, and we will cover that and show if there was it was waived.

Mr. Proskauer: I am not interested at all in the delay.

The Court: As long as the objection will be there along with the testimony, I will overrule it.

Mr. Proskauer: I except, I should expect your Honor to take all the testimony, practically.

Mr. Wilder: Yes.

The Witness: The reference continued before Mr. Larremore down to, I think it was about the latter part of June, at which time the Illinois Surety Company had obtained several adjournments, and he decided the case must be closed. In fact he entered a direction that the case be deemed closed, but subsequently gave
47 them two weeks more in case they wished to put in any additional testimony. They finally came in and put in additional testimony, and the matter was fixed for submission to him on briefs in August of 1918. Mr. Larremore then died and that ended that reference. After his death I had numerous conferences with Mr. Kellogg and with Mr. Rose looking to the appointment of a new referee. I submitted names and they submitted names, and we were not able to agree, and the motion was made for the ap-

pointment of a new referee, on which motion Mr. McGregor Smith was appointed, and that order is in evidence before your Honor.

The Court: How much time elapsed between the death of the referee and the appointment of the new referee?

The Witness: My impression is that Mr. Larremore died either in August or September, but about August, of 1918, and the motion for the appointment of the new referee was made in April.

I will state that one reason for the delay was the fact that Mr. Kellogg died and Mr. Rose, his partner, had asked me to wait in view of the fact that matters were more or less disturbed on that account, and also because he had difficulty in consulting with the receiver, Mr. James Hopkins. I think that is the history of the case up to that point.

By Mr. Wilder:

Q. Did you have any conversation with Mr. Rose or Mr. Kellogg in regard to the appointment of any referee prior to your making the motion?

A. Yes, I had.

Mr. Proskauer: That I object to as irrelevant and immaterial and on the ground that such a conversation would not bind the
48 Fidelity Company or, indeed, the Illinois Surety Company.

The Court: This conversation about the appointment of a second referee?

Mr. Wilder: Yes, sir.

The Court: Objection overruled.

Mr. Proskauer: Exception.

The Witness: Well, I had.

The Court: Which one of them conducted the litigation before the referee before his death—Mr. Kellogg or Mr. Rose?

The Witness: Mr. Kellogg.

Q. Mr. Kellogg had the laboring oar in it during his lifetime?

A. Yes, sir.

Q. Do you wish to state any further particulars about that conversation?

A. Well, there were numerous ones. This was before Mr. Kellogg's death, but Mr. Kellogg suggested that as the record was very voluminous it would be desirable to have it stipulated that the same record be used for the purposes of the new trial. At first the suggestion was that the record could be submitted to some Judge at Special Term and obviate the necessity of a reference. I agreed to that and he subsequently advised me that the receiver was not willing to have that done. Then I talked with him about consenting to names. I submitted names to him and he submitted names to me, and I did submit to him stipulations with the names in blank. But I think the correspondence after that shows more than my personal conferences.

Q. What happened after the appointment of Mr. Smith as referee;

what took place after the order of reference to Mr. Gregor Smith was made?

49 Mr. Proskauer: I make the same objection to that, if your Honor please.

The Court: Objection overruled.

Mr. Proskauer: Exception.

A. Well, after the appointment of the referee Mr. Smith, I think I had only one conference with Mr. Rose, and that was after service of notice of trial. I think it was about three days before the matter was to be brought on before Mr. Smith. Mr. Rose told me that he had been instructed not to take any part in the defense, but that he had advised the receiver that there was no outstanding bond in Action No. 2, and he said that he had just discovered there was such a bond and asked me as a personal favor to adjourn the hearing before Mr. Smith until he could get in communication with the receiver and find out whether the fact that this bond was still in existence affected his decision as to the further defense of the action. I told him that I would do so, and had arranged to adjourn the reference, but the day before the reference came on Mr. Rose called me up on the phone and told me that he had heard from the receiver and that it was not necessary to adjourn the hearing. Accordingly we attended before the referee and put in proof of the plaintiff's claim. There was no appearance before the referee for the defendant, and the report was made and judgment entered.

Q. Is there anything else you want to state?

A. Well, I will merely state that I have computed the interest at 6% on the amount of the demand, that is, $7,500, from June 21, 1919, the date of the entry of the judgment against the Illinois Surety Company, to be $342.43, making the total to date $7,842.43. No part of that has been paid to me.

50 Cross-examination.

By Mr. Proskauer:

Q. Mr. Ewen, I just want to get a few dates and extra-record facts from you. You made your reply here on the 18th day of January, 1918, did you not, in Action No. 2?

A. It seems so, yes.

Q. So that the action was finally at issue on January 18, 1918?

A. Well, my impression is it was at issue before, Mr. Proskauer.

Q. Yes, but you served a supplemental answer, did you not?

A. That was amended.

Q. An amended and supplemental answer. Then we have it around the other way?

A. I can give you the date of the original if you want.

Q. When was the case Action No. 2 originally at issue; just give it now from your file?

A. The date of the verification of the reply was july 6, 1915.

Q. Yes. So that the case was at issue in July, 1915?

A. Yes.

Q. When was the first order of reference made in this case. Action No. 2?

A. I could not tell you, sir. It is in evidence here.

Q. Then I will tell you?

A. I can find it for you.

Q. Wait a moment and I will give it to you?

A. It was November 21, 1917.

Q. So that your case was at issue from 1915 to 1917, before you took an order of reference?

A. Yes, I have explained it.

Q. I am not interested in the explanation, I want the fact. This case, this Action No. 2—this is not the action where you had the trouble about the removal and the remand?

A. No.

The Court: That was Action No. 1.

Q. That was Action No. 1?

A. Yes.

Q. And there was nothing in the record of this case which
51 prevented you from moving it for trial at once in 1915, was there?

A. We did move it for trial.

Q. You did not bring it on, though with a reference until 1917.

Mr. Wilder: It was not reached.

A. We had moved it for trial. It came on the calendar—think I gave you the date.

Q. Yes, the calendar was about a year behind in Brooklyn at the time, was it not? The calendar was just about a year behind in Brooklyn at that time?

A. I do not remember, but I should say so.

Q. And this action was in Brooklyn, in Kings County?

A. Yes.

Q. So that when did the case first appear upon the day calendar? The day calendar for the Court's information, being our ready calendar for trial in the State Court?

A. October 6, 1916.

Q. So that on October 6, 1916, you could have brought this case for trial?

A. We marked it ready. We did; we marked it ready.

Q. Then what happened to it?

A. It was passed to October—well, it was passed from day to day until December 4, 1914.

Q. You mean 1916?

A. Or 1916, yes.

Q. Or 1917, which was it; 1916 or 1917?

A. Well, no, I am mistaken about that. I have got the wrong date, but it was passed for several days. I have forgotten now how long.

Q. And then what happened to it?

A. What happened?
Q. Yes.
A. Well, as I stated, we finally agreed that we would have it referred to Mr. Larremore, and then we had it marked reserved generally.

Q. That is what I want to get at. It was marked reserved
52 generally in December, 1916, was it not? That means, for the Court's information, that it is put on the calendar generally and marked reserved, and either side may restore it for trial on five days' notice. It was put on the reserve general calendar about November or December, 1916?
A. Yes, sir.
Q. And the date of the order of reference, the first order of reference which you got here, was November 21, 1917, was it not?
A. Yes, sir.
Q. So that the case remained on the reserve general calendar, with nothing being done in it, for approximately a year?
A. No, that is not so, Mr. Proskauer.

The Court: What is that date, again?
Mr. Proskauer: November 21st, 1917, was the date of record.

Q. You did not move it for trial in any way during that year?
A. Yes, sir, we did.
Q. What did you do to move it for trial in that interval of a year?
A. Well, we made a motion to have it restored to the calendar.
Q. When did you make that motion?
A. I have given you the date.
Q. It was just before that order of reference, was it not?
A. Well, I have that date here. October 19, 1917, the motion was granted, but there had been a good many adjournments.
Q. So that you moved to restore it to the calendar in October, 1917?
A. Yes, sir.
Q. Then I am correct in saying that you allowed it to remain on the reserved general calendar from November, 1916, or December, 1916, until October, 1917?
A. Yes, sir.
Q. And then you moved to restore it?
A. Yes, sir.

53 Q. And then in November the consent which was signed which appears in the judgment roll, to refer it?
A. Yes, sir.
Q. So that for a period of very nearly a year, for eleven months from November to October, the case rested quietly on the general reserved calendar?
A. On that calendar, yes, sir.
Q. Then your action to take testimony before Mr. Larremore?
A. Yes.
Q. And you took testimony until some time in 1918?
A. Yes.
Q. About the summer of 1918?

A. Right.

Q. Your last hearing before Mr. Larremore was about August, 1918?

A. That is right.

Q. And Mr. Larremore died about that day?

A. Well, my impression is it was August or September, yes, before the briefs were submitted.

Q. Then your next action to do anything here was a motion to appoint another referee, was it not?

A. Well, we had constant conversations.

Q. I am not talking about your conferences, I am talking about your legal action?

A. Yes, that is right.

Q. When did you serve notice of motion to substitute a referee?

A. Some time in April, I think.

Q. Yes, April 26th or 27th, was it not?

A. Yes.

Q. So that again from the summer of 1918 until the spring of 1919, you made no move in court to restore this action?

A. No.

Q. Within a day or two after you served notice on Kellogg & Rose of a motion to restore this case by appointing another referee, they served on you this paper which bears your admission of service, did they not?

A. I see notice of withdrawing authority to appear, etc.

54 Mr. Proskauer: I offer that in evidence and will state on the record——

Mr. Wilder: Let me see it first, please.

Mr. Proskauer: Yes, it is a filed paper from the County Clerk's office.

Mr. Wilder: I object to that upon the grounds, of course, that that is no way of retiring from the case.

The Court: As I understood awhile ago, that notice was served after the expiration of what you claim to be a period of two years. Objection overruled.

Mr. Wilder: Exception. That is not one of the accepted means of grace for retiring from a case. That must be by substitution.

The Court: I understand this is claimed to be an exception to any general rule for substituting counsel.

Mr. Proskauer: And dead men do not need any grace, they just die.

This exhibit, which is from the County Clerk's office and bears an admission signed by Messrs. Wilder, Ewen & Patterson, dated April 29, 1919, is addressed to Messrs. Wilder, Ewen & Patterson, entitled in the action of Mackey against Illinois Surety Company, Action No. 2, and reads:

"You will please take notice that the authority of the undersigned to represent the defendant in the above-entitled action and to accept service of papers therein on its behalf, and to appear for it therein,

has been terminated and revoked, and that we are no longer authorized to accept service or to appear as attorneys for the defendants in this action.

Dated April 28, 1919.

(Signed) KELLOGG & ROSE."

55 Q. When the motion to substitute a new referee came up in court nobody appeared for the Illinois Surety Company?

A. No, they did not appear.

Q. And then you served a notice for trial before this new referee?

A. Yes.

Q. And nobody appeared before the new referee?

A. No.

Q. On whom did you attempt to serve the notice of the hearing before the referee?

A. Well, we served it on Kellogg & Rose and we also mailed it, or mailed a copy, to the receiver, Mr. James S. Hopkins, in Chicago, and my impression is that we also sent a copy to Mr. A. H. Hopkins, the president of the Illinois Surety Company.

Mr. Wilder: At what address?

The Witness: The same address.

Mr. Proskauer: He mailed it to the company.

Q. Kellogg & Rose did not accept service of that notice?

A. No, we made proof of service on them in each case.

Q. And they did not appear?

A. No.

Q. So that your proceedings before the referee who gave you the judgment were entirely ex parte in the sense that nobody appeared for the Illinois Surety Company?

A. Well, that is a contradiction. Nobody appeared—leave out "ex parte."

Q. Nobody appeared for the Illinois Surety Company?

A. No, they did not have to.

Q. You simply took the judgment on your own proof?

A. That is right.

Q. And that is the way you got this alleged judgment, on which you are suing?

A. Well, it is the same proof as was offered in the other action, Mr. Proskauer, the same exhibits and the same testimony.

56 Redirect examination.

By Mr. Wilder:

Q. Mr. Ewen, was the notice of motion for the referee or the notice of hearing or trial before the referee returned by Kellogg & Rose?

A. Well, they did not return it, but we had entered into an agreement with them so it was then agreed to avoid the necessity of having to send back every paper we served on them that their retention

should be without prejudice to any claim they made of lack of authority.

Q. Did you receive any order of substitution of any other attorneys?

A. No, there was no order of substitution, and nothing in the nature of their retirement in writing was received except the exhibit referred to, that was served on the attorneys for the plaintiff, Mr. Mackey.

Q. Do you know the address to which the notice of hearing and of the application was sent in Chicago?

Mr. Proskauer: I do not question that he mailed it, and that he mailed a copy of his notice of trial to the Illinois Surety Company at the proper address, in care of the receiver. Will you produce as part of this cross-examination the notices that were served on you by Mr. James S. Hopkins? You have stipulated to produce them—irrespective of the stipulations, produce the notices.

(Mr. Wilder produces papers and hands counsel.)

Recross-examination.

By Mr. Proskauer:

Q. Mr. Ewen, I show you a paper and ask you when that was received by Mr. Mackey (handing witness)?

A. Well, Mr. Proskauer, I cannot fix the date absolutely.
57 This was received before the motion for the receiver—I mean to say the motion for the new referee was returnable, but I do not know the exact date.

Q. It is dated April 18, 1919, and your stipulation is that it was served on you prior to April 29, 1919?

A. That is right. Not on me, but on Mr. Mackey. It came by mail.

Q. It was served on Mr. Mackey some time prior to the 29th of April and subsequent to the 18th of April, 1919?

A. Yes.

Mr. Proskauer: I offer that in evidence.

Mr. Wilder: We object to it as immaterial, incompetent and irrelevant, and having no bearing on the issues.

The Court: Objection overruled, it will be admitted.

Mr. Wilder: Exception.

Marked Defendant's Exhibit A.

The Witness: May I just make one statement, your Honor, I state that on the hearing before the referee I not only offered the notice served by Kellogg & Rose attempting to withdraw their appearance in the proceeding before the Referee, but also this paper, Defendant's Exhibit A, and offered it in evidence, so there should be no misapprehension about whatever claim is made by the other side.

Mr. Proskauer: I move to dismiss the complaint, if your Honor

please, on the ground that the plaintiff has failed to prove a cause of action; has failed to prove the cause of action set forth in the complaint. I assume your Honor will deny the motion for the present.

The Court: I will deny it.

58 Mr. Proskauer: I take an exception. I understand I must make that motion to dismiss in order to preserve my rights at the close of the whole case.

Mr. Proskauer: I offer in evidence an exemplified copy of a petition in the Superior Court of Cook County, Illinois, entitled H. H. Evans, and others vs. Illinois Surety Company, bill and petition for dissolution and receivership, which was filed April 19, 1916. I will make an offer of all the papers together.

Mr. Ewen: I object to these generally as immaterial and as not constituting any defense.

The Court: Objection overruled.

Mr. Ewen: Exception.

The Court: There is no objection to the form?

Mr. Ewen: I have no objection to the form, no.

Mr. Proskauer: They are exemplified in accordance with the statutes, your Honor.

Marked Defendant's Exhibit B1.

Also the answer of the Illinois Surety Company, filed April 19, 1916. Also exemplified copy of an order or decree made by the Court the 19th day of April, 1916.

The Court: It will be admitted.

Mr. Ewen: That last paper is further objected to on the ground that it appears it was made without notice, and it does not appear that the Court had jurisdiction to make such an order. That is a question that depends on the Illinois statute, your Honor. Exception.

The Court: Exception allowed.

Marked Defendant's Exhibit B2 & B3.

59 Mr. Proskauer: You do not want me to prove that the Superior Court of Cook County is a court of general jurisdiction?

Mr. Ewen: I do not know anything about it, Mr. Proskauer.

Mr. Proskauer: Are you making any question about that?

Mr. Ewen: I don't know.

The Court: As I understand your objection it is as to whether this is a decree of dissolution or not, within the meaning of that statute.

Mr. Wilder: Yes, sir, that is one of the questions.

The Court: Not about the court.

Mr. Ewen: In other words, your Honor, we take the position among others, that the making of this order, assuming that such an order could have the effect that they claim, is not one which a Court would have jurisdiction to make without some specific statutory authority. Such authority is given in certain actions in Illinois and it is not given in connection with an action brought by stockholders.

The Court: You are going back, then, to the point that the audi-

tor's suit is all that was contemplated by the statute and not a suit by stockholders. That is the ground of your objection.

Mr. Wilder: That is one of the grounds. That is, this is a stockholders' action and not an auditor's.

The Court: That is your point, and not a question about the Court's general jurisdiction.

Mr. Ewen: Your Honor, I do not think that even a court of general jurisdiction has any power to dissolve corporations or to
60 restrain them in such an action as this without specific legislative authority. It has been so held in New York—that is, as far as the Supreme Court of New York is concerned, which is a Court of general jurisdiction—that it has no power to disssolve a corporation except under specific statutory authority. But that is our objection, your Honor.

Mr. Proskauer: I still do now know whether my opponent is asserting a substantive objection, as to whether any Court in Illinois had jurisdiction under their statutes to make this order, which is a perfectly fair and reasonable argument to make, although I contend an unsound one, or whether he is asserting a lurking and technical objection that I have not proved that the Superior Court of Cook County is a court of general jurisdiction and of record.

Mr. Ewen: I think I will make that objection also, since my opponent suggests it, I think the defense is technical enough.

The Court: As I understand it, this Court takes judicial notice of all the statutes of the different states.

Mr. Proskauer: I suppose so, and supposed that my opponent would think so; but we wanted to see how technical he would be.

Mr. Wilder: And that is one of the additional objections, that it is without notice to anybody—certainly without notice to us, who are claiming to be creditors to the extent of over $115,000 and have got two large judgments.

Mr. Ewen: And without notice to the minority stockholders, too. Exception.

Mr. Proskauer: I now offer in evidence an exemplified
61 copy of an order dated the 19th day of April, 1916, appointing James S. Hopkins of Chicago receiver of the Illinois Surety Company and of all its assets, with very general powers which are set forth in that order, to prosecute and defend suits. It fixes his bond; it gives him leave to apply for further relief to the Court, and it retains jurisdiction until final hearing and settlement for the purpose of all unfinished business of the Illinois Surety Company and the receivership. The receivership is given the usual powers and duties of receivers in chancery.

Marked Defendant's Exhibit B4.

I now offer in evidence an order or decree made January 30, 1918, in this same cause, which recites that upon due notice to all parties——

Mr. Wilder: I do not know whether we have objected to that or not, but is this covered in the first exhibit? Because we ought to

object to this on the ground there is nothing here limiting any time, or anything of that kind—or anything in the nature of a dissolution.

The Court: Overruled.

Mr. Wilder: Exception.

Mr. Ewen: We just object to that as immaterial, and we do not think it has any bearing.

The Court: Overruled.

Mr. Ewen: Exception.

Marked Defendant's Exhibit B5.

Mr. Proskauer: I now offer in evidence an exemplified copy of an order dated January 30, 1918.

Mr. Ewen: Objected to on the same grounds.

The Court: Overruled.

Mr. Ewen: Exception.

62 The Court: Allowed.

Marked Defendant's Exhibit B6.

Mr. Proskauer: I now offer in evidence exemplified copy of an order dated April 18, 1919, on the petition of Mr. James S. Hopkins, the receiver, specifically referring to the case of Mackey vs. the Illinois Surety Company, and directing the receiver to notify Mackey of the said order of the Court of January 30, 1918

Marked Defendant's Exhibit B7.

I presume my opponents will concede that is the order, a copy of which I offered in evidence and which it was conceded had been served on Mackey about the 20th of April, 1918.

Mr. Ewen: There is no question about it, is there? That is objected to on the same grounds.

The Court: Objection overruled.

Mr. Ewen: Exception.

Marked as one exhibit, Defendant's Exhibit B.

Mr. Proskauer: I would like to note on the record the particular Illinois statute to which we hereby direct the Court's attention, thinking that may be convenient to the Court. I understand the Court takes judicial notice of them. Hurd's Revised statutes of Illinois of 1917, Part 1, page 739, entitled, "Surety Companies," with a special reference to Section 102-S of that law.

Then I should refer to the general provision of the insurance law in Hurd's Illinois Statutes, Part 2, page 1678, with a special reference to the Sections 12, 13, 14, 15 and 16.

Mr. Proskauer: Perhaps it may be of some help to say that the insurance law was approved February 17, 1874, in force July

63 1, 1874. There has apparently been no revision since that time on that point, and the surety law was approver and in force April 17, 1889, being the laws of 1889, page 260.

There is just one thing that I may have to call a witness on in the morning. I am in error that the Superior Court is the successor

of the Circuit Court which is referred to in this statute specifically; I do not know whether you have investigated that or not.

Mr. Wilder: We know absolutely nothing about Cook County except that Chicago is situated in that county.

Mr. Proskauer: With that exception I shall rest.

The Court: Has the plaintiff anything more to offer at this time?

Mr. Ewen: I just have a few of these records, your Honor, to put in.

I offer in evidence exemplified copy of petition of James S. Hopkins, receiver of the Illinois Surety Company, verified July 6, 1916, together with order dated July 10, 1916, entered thereon in the Cook County action.

Petition and order marked Plaintiff's Exhibits No. 6A and 6B.

Mr. Ewen: I offer in evidence the order filed February 20, 1918, construing the prior order directing the receiver to cease from the prosecution of suits.

Marked Plaintiff's Exhibit 6C.

Mr. Ewen: I offer in evidence the petition of James S. Hopkins, verified May 29, 1919, for permission to make settlement to pay Kellogg & Rose, attorneys, for services rendered in various proceedings in the New York actions.

64 Mr. Proskauer: That I object to as wholly irrelevant, and immaterial. There is not the slightest thing to connect with anything after they were instructed to discontinue the representation.

Marked Plaintiff's Exhibit 6D.

The Court: Is it any part of your contention that Kellogg & Rose, controlling this litigation, made it the receiver's suit?

Mr. Wilder: Yes, sir.

The Court: That is part of your contention?

Mr. Wilder: Yes, sir, the receiver himself attended and testified.

The Court: I will overrule the objection. I do not know what there is to it.

Mr. Proskauer: We except.

The Court: Exception allowed.

Mr. Ewen: I think it appears, that the receiver did carry on this litigation; but I merely want to show he had sanction of the Cook County Court for doing so.

I also offer in evidence order entered on the petition filed June 2, 1919, granting permission to pay Kellogg & Rose

Marked Plaintiff's Exhibit 6E.

Mr. Proskauer: I make the same objection to that on the specific ground that it does not appear, either from the petition or the order that Kellogg & Rose were paid for any services rendered after the decree of the Court and the order of the receiver instructing them to discontinue further proceedings in this court.

The Court: Objection overruled.

Mr. Proskauer: Exception.

Mr. Ewen: Do you concede, Mr. Proskauer, that the receiver did actually carry on through Kellogg & Rose the defense of this action, at any rate up to the time of the service of the notice of with-
65 drawal?

Mr. Proskauer: No. I do not concede that, excepting in this modified sense, that the receiver, of course, from time to time gave instructions as to the conduct of the defense, but I do not admit that in any way could operate as an estoppel against the receivers.

Mr. Wilder: How about the receivers attending and testifying?

Mr. Proskauer: May I finish, if you please, Mr. Wilder. Or could in any way effect the result of the statutory provisions which we will call to your Honor's attention.

The Court: It is your contention that the receiver, conducting or controlling litigation against the insolvent corporation, does not make the receiver a party to that litigation?

Mr. Proskauer: Exactly, sir. There are many cases where a corporation sues and the receiver comes in and participates in the suit, the only result of it being after a judgment is obtained it is filed as a claim with the receiver; the difference between that technical case and this one being however, that here we claim under the statute the receiver could not, without a substitution, which would be in the nature of a revivor, continue the case beyond that two-year period. As I have said on my brief, it is just as though the man had died and there had been revover against his executors, and there was a reviver, as you will see, in suits which were pending in appellate courts.

Mr. Wilder: We will look it up in the meantime.

Mr. Proskauer: For your Honor's convenience, I offer in
66 evidence Article 6, Section 23 and 24, of the Constitution of Illinois, the Constitution of 1870, together with the cases of Cobe vs. Ginger, 237 Illinois, 516, and Chicago Company, against Chicago Railroad Company, 112 Illinois 589; Berkowitz vs. Lester, 121 Illinois, 102, and Kerr vs. Flewelling 235 Illinois, 329—those cases holding that under the constitutional provision the Circuit Court and the Superior Court of Cook County are identical courts, having identical jurisdiction.

I will just hand your Honor a little memorandum of those cases. The defendant rests.

It is stipulated by counsel that the Illinois Surety Company was an Illinois corporation organized under the laws of the State of Illinois, and that the American Fidelity Company, the defendant, is a Vermont corporation.

JOHN EWEN, recalled in rebuttal by the plaintiff, testified as follows:

Mr. Wilder: I might call your Honor's attention to the fact that after you retired yesterday, Mr. Proskauer and I stipulated on the record that the Illinois Company was, of course, an Illinois corpora-

tion, and that the American Fidelity Company, the defendant here, was a Vermont corporation—because inadvertently alleged in the complaint that it was of New York. It was a Vermont corporation and that was a typographical error.

Mr. Proskauer: We also stipulate on the record that this
67 case be tried before the Court with one juror, with the same force and effect as though there were twelve jurors.

Mr. Wilder: We so stipulate.

Direct examination.

By Mr. Wilder:

Q. Mr. Ewen, Mr. Proskauer asked you in regard to what progress, if any, was being made in the fall of the year 1918, and the spring 1919, in bringing the action of Mackey against the Illinois Surety Company, Action 2, to a conclusion, and you stated that you had conversations with Mr. Kellogg during his lifetime and then with Mr. Rose. Did you also have correspondence?

A. I did.

Q. Is this the correspondence that you had on the subject (handing witness)?

A. Yes, sir.

Mr. Wilder: Let Mr. Proskauer look over those letters and we will put them in en masse. The first delay was due to the illness of Mr. Kellogg, and then that was carried on account of his death, and then after that Mr. Rose was a new man in the case, and so it happened.

Mr. Proskauer: I object to that as irrelevant. Otherwise they are admitted.

The Court: They will be admitted.

Mr. Proskauer: Exception.

Mr. Wilder: File of correspondence between Kellogg & Rose, attorneys, for Surety Company and Wilder, Ewen & Patterson, attorneys for David Clinton Mackey.

Marked Plaintiff's Exhibit No. 7.

Q. Mr. Ewen, in the progress of the trial before Referee Larre-
68 more, of this action, were the two Hopkinses, father and son, the one the president of the *president of the* company and the other the receiver, present as witnesses?

A. Oh, yes, they were.

The Court: Leaving open the question whether the receiver was so identified with the defense as to make him a party.

Mr. Wilder: Yes, sir.

The Witness: They were both present and both testified. They appeared three times. That is, they were called on direct and then recalled twice afterwards. A stipulation was entered into on the record in the presence of these two Hopkinses.

Q. Will you state what it was, or read it from the record.

A. Well, on February 8, 1918, the hearing before Mr. Larremore, the following occurred, and both the Hopkinses were present and testified at that hearing.

"Mr. Kellogg: I move to consolidate the actions, as we suggested before, by making the defenses in one action applicable to the defenses in the other, and all the evidence shall relate to both cases so far as it——

"Mr. Ewen (interrupting): I cannot consent to the consolidation of the actions, because they are two separate actions, and we have security in one which we have not in the other.

"I consent to this: That the evidence in Action No. 1 be considered the evidence in No. 2, subject, of course——

"Mr. Kellogg: And that the evidence in Action No. 2 be considered the evidence in Action No. 1?

"Mr. Ewen: They cannot be separated.

"The Referee: No, he is just stating the converse of your proposition?

69 "Mr. Kellogg: I am willing to enter into a stipulation which will protect your bond.

"Mr. Ewen: I say that the evidence in Action No. 1 shall be deemed the evidence to be taken in Action No. 2.

"The Referee: And that the evidence in Action No. 2 shall be deemed to be taken in Action No. 1.

"Mr. Ewen: No evidence has yet been taken in Action No. 2. I do not know, we have a different claim in Action No. 2.

"Mr. Kellogg: You agree to that so far as applicable?

"Mr. Ewen: So far as applicable, yes.

"The Referee: So far as it is applicable.

"Mr. Ewen: Without reference to the pleadings, it is the same thing, a prolongation of the other."

Both of them, Senator Hopkins and his son were present. They were present at this time and they also attended on one subsequent occasion after this, when they appeared before——

Q. Is there any other stipulation that you care to incorporate?

A. At the hearing on September 12, 1916, before the Referee—this was in Action No. 1, page 135 of the minutes, appeared the following:

"Mr. Kellogg: I will tell you confidentially that I am retained and paid by the receiver"——

Mr. Proskauer: May I note my same objection and exception, your Honor.

The Court: Yes.

The Witness: Well, he says "confidentially" first.

70 (Continuing:) "—and told to go ahead with this action, and I am doing so in the name of the company.

"The Referee: Have you any objection to putting that on the record? I do not think it is an unreasonable request.

"Mr. Kellogg: I will put it on the record."

Mr. Proskauer: What date is that, please?

Q. What is the date of that hearing?
A. September 12, 1916.
Q. Is there any other or further stipulation in reference to the matter in there?

Mr. Proskauer: I think I should also move to strike that out, if your Honor please, on the ground that Mr. Kellogg's statement is not binding on the receiver without proof of authority to make it.
Mr. Wilder: When his attorney read it?
The Court: You make your record. I deny the motion.
Mr. Proskauer: We except. I am doing it just to make a record, so that the whole thing will be preserved.

Q. Have you any further stipulation you want to read?
A. Well, there was more conversation led up to this. This occurred at the time when the receiver was appointed and I had made objection to the action proceeding so far as the counterclaim was concerned, unless Mr. Kellogg showed that he had some authority to appear for the receiver; because I took the position that otherwise, if we were successful, the receiver would or might be in a position to disclaim being bound by the decision and, on the other
71 hand, if we were unsuccessful he would be in a position to take advantage of it, and there was some conversation before this, but this was the result of it.
Q. Will you state what it was?
A. Before? It is four or five pages, the result is what I have read.
Q. Is there any other stipulation?
A. I think that is all.

The Court: That, of course, was after the bond releasing the attachment.
Mr. Proskauer: Yes.
Mr. Wilder: Yes, sir. The attachment which we issued was immediately bonded by the American Fidelity Company
Mr. Proskauer: Do you rest?
Mr. Wilder: I think we rest, Mr. Ewen, do we not?
Mr. Ewen: Yes.
Mr. Proskauer: Both sides having rested, I renew my motion to dismiss, and also move to direct a verdict for the defendant on the same grounds as stated at the close of the plaintiff's case, particularly on the ground that it now affirmatively appears from the record that at the time this alleged judgment was entered the Illinois Surety Company had ceased to exist for more than the statutory period referred to in the Illinois Statutes, and it was impossible to enter a valid legal judgment against it at that time.
Mr. Ewen: Your Honor, I move for the direction of a verdict in favor of the plaintiff, on the ground that the defenses have none of them made out, and there is no dispute about the facts relating to the cause of action; and in addition to the questions of law under the

Illinois statutes, I call your Honor's attention to the fact that there is no proof on one of the facts on which they rely, and that
72 is that the Illinois Surety Company ceased to do business, either since the making of the order restraining it, or at any other time. The section under which they rely for their defense provides that under certain circumstances where an insurance company has failed to do business or to prosecute its business for more than one year after the making of a decree restraining it from doing business, it shall cease for certain purposes to be a body corporate. That is simply on the facts.

The Court: You are not entering now into an argument, are you? You are not entering upon an argument of your motion now; you are simply stating your motion?

Mr. Ewen: Well, as a matter of fact, your Honor, I think for the purposes of the statute the Illinois Surety Company did not as a matter of fact—entirely outside of the proof in this case—cease to do business because the collection of premiums, the settlement of its claims, and so on—for that purpose is doing business.

The Court: We will stick to the record.

Mr. Ewen: However, there is no evidence on that point at all. That is the point I make now.

The Court: I hold that this defense has been established. There may be reasons regarding the collection of assets by a corporation or by its receiver, either in his own name or the name of the corporation, for the benefit of the creditors. Those matters are largely settled as matters of convenience. In equity it is recognized that the creditors of a corporation have a right to resort to assets and the machinery of their collection, and what is most convenient and available are largely practical questions and might influence a court to make an exception or carve an exception out of the
73 statute, which reasons would not apply where someone was seeking to establish a claim against the corporation.

When this corporation was declared insolvent, it probably should be considered that that proceeding involved two things, that is a decree of dissolution and the collection and distribution of the assets. After the order made on the answer of the defendant admitting its insolvency, if it was not complicated by other provisions in the order, and subsequent proceedings it might very well be considered in the decree of dissolution. But this recognition giving the receiver authority to assume the conduct of litigation conducted in its name would seem to be in some aspects inconsistent with holding it was an absolute decree of dissolution. The statute itself continues the corporation temporarily for the purpose of collecting its assets. The Court is forced to the conclusion that upon the appointment of the receiver the corporation did cease to function and do business as a corporation, the non-user provided or called for by the statute came into effect, and that this period provided for in Section 14 began to run.

It is well recognized in the administration of receiverships and in bankruptcy that there are two ways of liquidating claims—you can liquidate them in courts having jurisdiction other than the court of

the receivership, at the convenience of the parties, or go into a bankruptcy proceeding and liquidate them there. In the one case the litigation might be summary, in the other not, and this interest that all the creditors have in the rest and the winding up of the business very naturally suggests that a time limit would be put by order of the Court or by statute when this extraneous and outside litigation shall cease and creditors who have not got their claims against the corporation liquidated should come into the receivership,
74 and where the Court could force a summary hearing, and have them liquidated there. The policy of speedily distributing the assets among all the creditors, the statute, evidently, recognizes as being sufficient to justify the risk to be incurred by the individual litigant in not being able to terminate the litigation necessary to liquidate his claim fully.

One thing that has given me some trouble in considering this—and it has not been adverted to — all—is whether there would be anything in the proposition any conflict of laws or jurisdictions, as to this bond dissolving the attachment; whether it could in any sense be considered the res within the jurisdiction of this Court. It seems to me not. This case in 102 Illinois was a case evidently where the attachment—the attaching of the property of a foreign corporation in Illinois—still existed. That is, the Court had got its clutches upon the property itself, and it was holding that res and did go through and administer it.

Of course, in admiralty the bond takes the place of the vessel or the res. But, in the instant case, this is strictly a law action—we are in a law court and not a court of equity or admiralty. It seems to me the Court is not justified in trying to apply an equitable principle to this bond, and try to treat it as a res, that the Court here has got hold of while this corporation did exist, and uphold jurisdiction in spite of the fact that the corporation had become defunct, and expired by the limitations provided in Section 14.

I think that is all I have got to say. I will instruct the juror to return a verdict for the defendant.

The Clerk: Mr. Juror, by direction of the Court you find a verdict in favor of the defendant.

The Juror: I do.

75 Mr. Wilder: If your Honor please, I except to the verdict, and I move to set it aside.

The Court: Exception allowed, motion denied.

Mr. Wilder: To set it aside on the grounds mentioned in our code, Section 999 of the Code of Civil Procedure, as against the evidence and the weight of evidence.

It seems, I might say in conclusion, a pretty hard case. Here we are letting loose and relieving the American Fidelity Company of paying $7,500. It deprives us of it and it does not increase the fund for distribution in Illinois one dollar.

Mr. Proskauer: Oh, yes, it does.

Mr. Wilder: And they incurred or took the risk themselves for the premium that was paid at a time when the Illinois Surety Company was doing business and not a party to it.

The Court: I do not agree with the appellant at all. You bring that before the appellate court.

Mr. Wilder: We can arrange about the stay of proceedings.

Mr. Proskauer: Yes.

76 PLAINTIFF'S EXHIBIT 1.

Judgment Roll.

Supreme Court of the State of New York, County of Kings.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within 20 days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, May 11th, 1915.

WILDER, EWEN & PATTERSON,
Plaintiff's Attorneys.

Office & Post Office Address, 45 Cedar Street, Borough of Manhattan, City of New York.

77 *Complaint.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

The complaint of the plaintiff by Wilder, Ewen & Patterson, his attorneys, respectfully shows and alleges as follows:

For a First Cause of Action.

First. That at all the times hereinafter mentioned, the defendant was and still is a foreign corporation, duly organized and existing

under and pursuant to the laws of the State of Illinois, and having an office and place for the transaction of business in the City and State of New York.

Second. That between December 1st, 1908, and November 3rd, 1910, the plaintiff and one Wight V. Abbott were co-partners doing business under the firm name of Mackey & Abbott.

Third. That between December 1st, 1908, and November 3rd, 1910, the said plaintiff and the said Abbott, as co-partners as aforesaid, at the special instance and request of the defendant, performed work, labor and services in connection with the procuring
78 and execution of surety company bonds and undertakings for the defendant, for which the defendant agreed to pay the said Mackey & Abbott a commission of thirty-five per cent (35%) on all premiums earned on surety bonds and undertakings executed or procured by the said Mackey & Abbott in behalf of the defendant other than judicial bonds, and forty per cent (40%) on all premiums earned on judicial bonds and undertakings and a like commission upon all renewal premiums paid on the said bonds and undertakings.

Fourth. That the said Mackey & Abbott procured and executed on behalf of the defendant, a large number of bonds and undertakings between the said dates of December 1st, 1908, and November 3rd, 1910, upon which a large number of premiums were earned and renewal premiums agreed to be paid to the defendant, on which the said Mackey & Abbott became entitled to commissions as above provided.

Fifth. That prior to the commencement of this action, all right, title and interest of the said firm of Mackey & Abbott in and to any moneys due or to become due the said firm of Mackey & Abbott, from the defendant, was duly assigned, transferred and set over to the plaintiff, and the plaintiff is the owner of such claim and entitled to receive any commissions paid on such premiums and renewals.

Sixth. On information and belief that between the 4th of December, 1914, and the time of the commencement of this action, the defendant received renewal premiums on the said bonds obtained by the said firm of Mackey & Abbott, in excess of the sum of Five thousand Dollars ($5,000.00), and that there is now due and
79 owing from the defendant to the plaintiff commissions thereon in the sum of Two thousand Dollars ($2,000) no part of which has been paid although duly demanded.

For a Second Cause of Action.

Seventh. That at all the times hereinafter mentioned, the defendant was and still is a foreign corporation, duly organized and existing under and pursuant to the laws of the State of Illinois, and having an office and place for the transaction of business in the City and State of New York.

Eighth. That between November 3rd, 1910, and December 15th, 1913, the plaintiff at the special instance and request of the defendant performed work, labor and service in connection with the procuring and execution of surety bonds and undertakings for the defendant, for which the defendant agreed to pay to the plaintiff a commission of thirty-five per cent (35%) on all premiums earned on surety bonds and undertakings executed or procured by the said plaintiff on behalf of the defendant and other than judicial bonds, and forty per cent (40%) of all premiums earned on judicial bonds and undertakings and a like commission on all renewals of premiums of said bonds and undertakings.

Ninth. That the said plaintiff procured and executed for the defendant a large number of bonds and undertakings between November 3rd, 1910, and December 15th, 1913, for which a large amount of premiums and renewals thereof were earned by and agreed to be paid to the defendant, on which the said plaintiff became entitled to commissions as above provided.

80 Tenth. On information and belief that the defendant between December 4th, 1914, and the time of the commencement of this action, received a large amount of premiums and renewal premiums on the said bonds, so written, upon which the plaintiff became entitled to payment of commissions as aforesaid in the sum of Five thousand Dollars ($5,000), no part of which has been paid, although duly demanded.

For a Third Cause of Action.

Eleventh. That at all the times hereinafter mentioned the defendant was and still is a foreign corporation, duly organized and existing under and pursuant to the laws of the State of Illinois, and having an office and place for the transaction of business in the City and State of New York.

Twelfth. That between March 23rd, 1914, and March 1st, 1915, the plaintiff, at the special instance and request of the defendant, performed work, labor and services as a broker in procuring for the defendant certain bonds for execution by it, and the payment to the defendant of premiums for the execution of such bonds, and that the customary broker's compensation for such services was twenty-five per cent (25%) of the amount of the said premiums, and that the defendant agreed to pay to the plaintiff twenty-five per cent of the premiums received upon said bonds as compensation for such services.

Thirteenth. That the said bonds so procured by the plaintiff for execution by the defendant, and the premiums paid thereon, were as follows:

On or about March 23, 1914, administration bond for Kate Hartkopf, policy number 1358; amount of bond $50,000, amount

81 of premium $160.00; and renewal $106.07;

About May 28th, 1914, undertaking on appeal to Court

of Appeals in action of Lord & Taylor against Hatch, policy number 157; amount of bond $167,300, premium $1,673;

On or about July 8, 1914, bond for George Rector, Inc., appeal bond re Hotel Claridge Company, number 1701; amount of bond $1,170.00; premium $13.00;

Appeal bond policy number 1084, re Am. Vernette M. Crombie, Augustus R. Keller, doing business under the trade name of A. R. Keller & Co.; amount of premium $40.00.

Fourteenth. On information and belief that the premiums received by the defendant for the execution of the said bonds is the sum of Nineteen hundred and ninety-two 07/100 Dollars ($1,992.07), and that the plaintiff became entitled to receive twenty-five per cent (25%) thereof, or the sum of Four hundred and ninety-eight 02/100 Dollars ($498.02) no part of which has been paid although duly demanded.

Wherefore, the plaintiff demands judgment against the defendant for the sum of Seven thousand four hundred and ninety-eight 02/100 Dollars ($7,498.02), with interest thereon from the 20th day of February, 1915, together with the costs and disbursements of this action.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

Office & Post Office Address, 45 Cedar Street, Borough of Manhattan, City of New York.

82 STATE OF NEW YORK,
County of New York, ss:

David Clinton Mackey, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to those matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

DAVID CLINTON MACKEY.

Sworn to before me this 12th day of May, 1915.
C. S. BOSTWICK,
Notary Public, 183, *New York Co.*

Notice of Appearance (Summarized).

Notice of appearance in this action by Nelson L. Keach, as attorney for the defendant, dated May 21, 1915. Its printing in full is dispensed with as not being material to the issues in this action.

83 *Order for Bill of Particulars.*

At a Special Term, Part I, of the Supreme Court of the State of New York, Held in and for the County of Kings, in the Kings County Court House in the Borough of Brooklyn, City of New York, this 26 day of August, 1915.

Present: Hon. Isaac M. Kapper, Justice.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

A motion having been made by the plaintiff for a bill of particulars of the defendant's claim for $2,724.34, set forth in the twelfth paragraph of the amended answer, and the said motion having come on duly to be heard, and after hearing John Ewen, Esq., of counsel for the plaintiff in support of said motion, and Nelson L. Keach, Esq., attorney for the defendant, appearing and not opposing and due deliberation having been had,

Now, on reading and filing the notice of said motion, dated July 6th, 1915, together with the affidavit of David Clinton Mackey, verified July 16th, 1915, thereto annexed, and on reading the pleadings in support of said motion, it is on motion of Wilder, Ewen & Patterson, attorneys for the plaintiff,

Ordered, that the motion be and the same hereby is granted, and that the defendant, within ten days after service of a copy
84 of this order with notice of entry, serve upon the plaintiff a verified bill of particulars of the defendant's claim for $2,724.34, as set forth in the twelfth paragraph of the amended answer, setting forth in detail:

(1) The dates when written and a particular description of each of the bonds upon which the defendant claims it has suffered losses.

(2) The dates when and the amount of each commission paid to the plaintiff by the defendant.

(3) The date and the amount of each of such alleged losses.

Enter.

I. M. K.,
J. S. C.

Granted Aug. 26, 1915.

CHARLES S. DEVOY,
Clerk.

85 *Notice of Trial.*

Supreme Court, Kings County.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

Please to take notice, that the issue of fact in this action will be brought to trial and an inquest taken therein at a Trial Term of this Court, appointed to be held in and for the County of Kings at the County Court House in the Borough of Brooklyn, in New York City on the 4th day of October, 1915, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated, the 15th day of September, 1915.

Yours, &c.,

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

45 Cedar Street, Borough of Manhattan, New York City.

To: Nelson L. Keach, Attorney for Defendant, 170 B'way.

(Endorsed.)

Service of the within notice is hereby admitted.
Dated, Sept. 17, 1915.

NELSON L. KEACH,
Attorney for Defendant.

86 *Order of Substitution.*

At a Special Term, Part II, of the Supreme Court Held in and for the County of Kings, at the County Court House, Borough of Brooklyn, New York City, on the 23rd Day of February, 1917.

Present: Hon. Abel E. Blackmar, Justice.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

On reading and filing the annexed consent and on motion of Kellogg & Rose, it is hereby

Ordered, that Messrs. Kellogg & Rose be substituted herein as attorneys for the defendant in the place and stead of Nelson L. Keach, Esq.

Enter,

ABEL E. BLACKMAR,
J. S. C.

Granted Feb. 23, 1917.
WM. E. KELLY,
Clerk.

87 *Consent.*

New York Supreme Court, Kings County.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

It is hereby consented that Kellogg & Rose be substituted in my place, name and stead, as attorneys for the defendant in the above entitled action.

Dated, New York, January 29, 1917.

NELSON L. KEACH,
Attorney for Defendant.

[SEAL.] ILLINOIS SURETY COMPANY,
By A. J. HOPKINS,
President.

Attest:
CHAS. E. SCHICK,
Secretary.

STATE OF ILLINOIS,
County of Cook, ss:

On the 21st day of February, in the year one thousand nine hundred and seventeen, before me personally came A. J. Hopkins to me known, who, being by me duly sworn, did depose and say that he resides in Aurora, Illinois, that he is the president of Illinois Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that
88 the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] GEO. O. FOY,
Notary Public.

Order.

At a Special Term for the Hearing of ex Parte Matters Held in and for the County of Kings, at the County Court House, in the Borough of Brooklyn, City of New York, on the 21st Day of November, 1917.

Present Hon. Russell Benedict, Justice.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

The parties hereto, including the American Fidelity Company, the surety upon the undertaking given to discharge the attachment in the above-entitled action, having entered into an agreement and stipulation to refer the above-entitled action upon certain conditions referred to therein,

89 Now, on reading and filing the said stipulation and consent, and on motion of Kellogg & Rose, attorneys for the defendant, it is

Ordered:

1st. That an amended and supplemental complaint may be served herein by the plaintiff, which shall set forth the plaintiff's claim under the contracts sued upon herein from November 28th, 1914, to the date of service thereof. That the defendant shall have leave within 20 days after the service of said supplemental complaint to serve an answer thereto, and may set up therein the counterclaims alleged in the amended answer in the action now pending between the parties known as Action No. 1, to which the plaintiff may within 20 days from the service thereof serve a reply setting up such defenses as the plaintiff may be advised, excepting the Statute of Limitations.

2nd. That the issues raised by such pleadings in this action be and the same hereby are referred to Wilbur Larremore, Esq., counselor at law, as referee, to hear, try and determine the same.

3rd. That only the excess of the counterclaims in Action No. 1 over the amount, if any, found due on the plaintiff's cause of action in Action No. 1, shall apply to or be allowed as a setoff in this action, and the amount thereof, if any, so applied as a setoff in this action, shall be allowed to the plaintiff herein as a credit upon any judgment recovered by the plaintiff in Action No. 1.

Enter,

R. B., *J. S. C.*

Granted November 21/1917.

WM. E. KELLY,

Clerk.

90 *Stipulation.*

Supreme Court of the State of New York, County of Kings.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

It is hereby stipulated and consented:

1. That an amended and supplemental complaint be served herein, which shall set forth the plaintiff's claim under the contracts sued upon from November 28th, 1914, to the date of the service thereof. That the defendant shall have leave within twenty days after the service thereof, to serve an answer thereto, and may set up therein the counterclaims alleged in the amended answer in the action now pending between the parties, known as Action No. 1, to which the plaintiff may, within twenty days from the service thereof, serve a reply, setting up such defenses as the plaintiff may be advised except the statute of limitations.

2. That the issues raised by such pleadings in this action shall be referred to Wilbur Larremore, Esq., as referee, to hear and determine.

3. That only the excess of the counterclaims in Action No. 1 over the amount, if any, found due on the plaintiff's cause of action in Action No. 1, shall apply to or be allowed as a setoff in
91 this action, and the amount thereof, if any, so applied as a setoff in this action, shall be allowed to the plaintiff herein as a credit upon any judgment recovered by the defendant in Action No. 1.

4. That an order may be entered upon this stipulation without notice.

Dated, November 14, 1917.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

KELLOGG & ROSE,
Attorneys for Defendant.

[Seal of Surety Co.]

AMERICAN FIDELITY COMPANY,
By CECIL PLATT,
Surety on Bond Given to Release Attachment.

Amended Complaint.

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

The plaintiff by Wilder, Ewen & Patterson, his attorneys, for an amended and supplemental complaint, pursuant to order entered herein November 21st, 1917, respectfully shows and alleges as follows:

For a First Cause of Action.

First. That at all the times hereinafter mentioned the defendant was and still is a foreign corporation duly organized and existing under the laws of the State of Illinois, and having an office and place for the transaction of business in the City and State of New York.

Second. That between June 1st, 1907, and November 3rd, 1910, the plaintiff and one Wight V. Abbott were co-partners doing business under the firm name of Mackey & Abbott.

Third. That between June 1st, 1907, and November 3rd, 1910, the said plaintiff and the said Abbott as co-partners as aforesaid, at the special instance and request of the defendant performed work, labor and services as agents for the defendant in connection with the procuring and execution of surety bonds and undertakings for the defendant, for which the defendant agreed to pay the said Mackey & Abbott a commission of forty (40) per cent on all premiums which might become due on bonds written between June 1st, 1907, and August 1st, 1908, together with a commission of thirty (30) per cent of all renewal premiums on bonds so procured and written during the said period and for which services the defendant agreed to pay to the said Mackey & Abbott a commission of thirty-five (35) per cent on all premiums which might become due on surety bonds and undertakings executed or procured by the said Mackey & Abbott on behalf of the defendant, other than judicial bonds, and forty (40) per cent on all premiums earned on judicial bonds and undertakings so written and procured between August 1st, 1908, and November 3rd, 1910, and a like commission on all renewal premiums which might be paid on the said bonds and undertakings written and procured between the said dates.

Fourth. That in the agency agreement entered into between the defendant and the said Mackey & Abbott, it was further agreed that the said Mackey & Abbott should assume the responsibility for all

premiums on new business and renewals on fidelity bonds which it was agreed were to be paid by the said Mackey & Abbott to the defendant within sixty (60) days whether collected by them or not.

Fifth. That the said Mackey & Abbott procured and executed on behalf of the defendant a large number of such bonds and undertakings between the said dates of June 1st, 1907, and November 3rd, 1910, upon which a large number of original premiums were earned and renewal premiums agreed to be paid to the defendant, upon all of which premiums the said Mackey & Abbott became entitled to commissions as before stated and during the said period the said Mackey & Abbott paid to the defendant a large number of original premiums and renewal premiums on fidelity bonds, within sixty days after the same became due, although the same had not been collected or received by the defendant or the said Mackey & Abbott.

Sixth. That prior to the commencement of this action, all right, title and interest of the said firm of Mackey & Abbott in and to any moneys due or to become due the said firm of Mackey & Abbott from the defendant, was duly assigned, transferred and set over to the plaintiff, and the plaintiff is the owner of such claim and entitled to receive any commissions paid on such premiums.

94 Seventh. Upon information and belief between the 28th day of November, 1914, and the date of the service of this complaint, the defendant has received renewal premiums on the said bonds so obtained by the said firm of Mackey & Abbott, and has also received payment of original premiums and renewals on fidelity bonds paid by the said firm of Mackey & Abbott to the defendant as aforesaid, although not theretofore received or collected by the defendant, or the said firm of Mackey & Abbott, in excess of the sum of thirty thousand dollars ($30,000.00). That there is now due and owing from the defendant to the plaintiff commissions thereon, and original and renewals on fidelity bonds so collected, the sum of six thousand dollars ($6,000.00), no part of which has been paid although duly demanded.

For a Second Cause of Action.

Eighth. That at all the times hereinafter mentioned the defendant was and still is a foreign corporation duly organized and existing under and pursuant to the Laws of the State of Illinois, and having an office and place for the transaction of business in the City and State of New York.

Ninth. That between November 3rd, 1910, and December 17, 1913, the plaintiff, at the special instance and request of the defendant, performed work, labor and services as agent for the defendant in connection with the procuring and execution of surety bonds and undertakings for the defendant, for which services the defendant agreed to pay to the plaintiff a commission of thirty-five (35) per cent on all premiums earned on surety bonds and undertakings executed or procured by the said plaintiff on behalf of the defendants

other than judicial bonds, and forty (40) per cent of all
95 premiums earned on judicial bonds and undertakings, and
a like commission on all renewals of premiums of said bonds
and undertakings.

Tenth. That in the agreement of agency entered into between the plaintiff and the defendant under which the said services were performed, it was provided that the plaintiff should assume the responsibility for all premiums on new business and renewals on fidelity bonds which it was agreed were to be paid by the said plaintiff to the defendant within sixty (60) days whether collected by him or not.

Eleventh. That the said plaintiff procured and executed for the defendant a large number of bonds and undertakings between November 3rd, 1910, and December 17, 1913, upon which a large number of premiums and renewals thereof were earned by and agreed to be paid to the defendant, on which the said plaintiff became entitled to commissions as above provided, and during the said period and between the said dates the plaintiff paid to the defendant large sums of money for original premiums and renewal premiums on fidelity bonds, which had not been collected by the defendant or the plaintiff.

Twelfth. On information and belief that the defendant, between November 28th, 1914, and the date of the service of this complaint, has received a large amount of premiums and renewal premiums on the said bonds so written, in excess of the sum of $30,000 upon which the plaintiff became entitled to payment of commissions as aforesaid, in the sum of twelve thousand dollars ($12.000.00) and a large amount of original premiums and renewal premiums on fidelity bonds paid by the plaintiff to the defendant, but not theretofore collected or received by the plaintiff or the defendant, in excess
of the sum of $8,000.00 upon which the plaintiff became en-
96 titled to the sum of five thousand two hundred dollars ($5,-
200.00) no part of which has been paid although duly demanded.

For a Third Cause of Action.

Thirteenth. That at all the times hereinafter mentioned, the defendant was and still is a foreign corporation, duly organized and existing under and pursuant to the laws of the State of Illinois, and having an office and place for the transaction of business in the City and State of New York.

Fourteenth. That between March 23rd, 1914, and March 1st, 1915, the plaintiff, at the special instance and request of the defendant, performed work, labor and services as a broker in procuring for the defendant certain bonds for execution by it, and the payment to the defendant of premiums for the execution of such bonds, and that the customary broker's compensation for such services was twenty-five per cent (25%) of the amount of the said premiums, and that

the defendant agreed to pay to the plaintiff twenty-five (25) per cent of the premiums received upon said bonds as compensation for such services.

Fifteenth. That the said bonds so procured by the plaintiff for execution by the defendant, and the premiums paid thereon, were as follows:

On or about March 23, 1914, administration bond for Kate Hartkopf; policy number, 1358; amount of bond, $50,000; amount of premium, $160; and renewal, $106.07.

About May 28th, 1914, undertaking on appeal to Court of Appeals in action of Lord & Taylor against Hatch, policy number 157; amount of bond, $167,300; premium, $1,673.

97 On or about July 8, 1914, bond for George Rector, Inc. appeal bond re Hotel Claridge Company, number 1701; amount of bond, $1,170.00; premium, $13.00. Appeal bond policy number 1084, re Am. Vernette M. Crombie, Augustus R. Keller, doing business under the trade name of A. R. Keller & Co.; amount of premium, $40.00.

Sixteenth. On information and belief that the premiums received by the defendant for the execution of the said bonds is the sum of nineteen hundred and ninety-two 07/100 dollars ($1,992.07), and that the plaintiff became entitled to receive twenty-five per cent (25%) thereof, or the sum of four hundred and ninety-eight 02/100 dollars ($498.02), no part of which has been paid although duly demanded.

Wherefore the plaintiff demands judgment against the defendant for the sum of twenty-three thousand dollars ($23,000.00) with interest thereon from the 28th day of May, 1916, together with the costs and disbursements of this action.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

Office & Post Office Address, 45 Cedar St., Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

David Clinton Mackey, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing amended and supplemental complaint and knows the contents thereof; that the same is true to his own knowledge except as to those mat-
98 ters which are therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

DAVID CLINTON MACKEY.

Sworn to before me this 28th day of November, 1917.
RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificate filed in New York & Kings Counties.
New York County No. 170.
New York Register's No. 8138.
Kings County No. 30.
Kings Register No. 8059.

Answer.

New York Supreme Court, Kings County.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

The defendant, by Kellogg & Rose, its attorneys, answering the amended and supplemental complaint of the plaintiff, respectfully shows to the Court and alleges upon information and belief:

99 For a First Separate and Distinct Defense to the First Alleged Cause of Action.

First. It admits the allegations contained in paragraphs marked or numbered "First," "Second" and "Fourth" of said amended and supplemental complaint.

Second. It admits that between June 1st, 1907, and November 3rd, 1910, the said plaintiff and Wight V. Abbott, as copartners, rendered certain services for the defendant in procuring and executing certain surety bonds and undertakings under two certain contracts, in writing, for which services the defendant agreed to pay therefor, as provided in said contracts and not otherwise, as to the terms of which contracts defendant begs leave to refer to the originals thereof as they shall to be produced upon the trial of this action. Except as hereinbefore specifically admitted, it denies each and every allegation contained in paragraph marked or numbered "Third" of said amended and supplemental complaint.

Third. It admits that Mackey & Abbott procured and executed, on behalf of the defendant, a large number of bonds and undertakings between the said dates of June 1st, 1907, and November 3rd, 1910, upon which a large number of original premiums were earned and renewal premiums agreed to be paid to the defendant, upon which premiums the said Mackey & Abbott became entitled to commissions, as provided in the two contracts hereinbefore referred to and not otherwise, and that during the said period the said Mackey

& Abbott paid to the defendant certain sums of money, usually accompanied by a statement of alleged premiums collected, upon
100 which statement the said Mackey & Abbott had, in each instance, first deducted the amount of their commissions, but this defendant alleges that said statements were not full, accurate or true statements of all premiums due to the defendant.

Except as hereinbefore specifically admitted, it denies each and every allegation contained in paragraph marked or numbered "Fifth" of said amended and supplemental complaint.

Fourth. It denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph marked or numbered "Sixth" of said amended and supplemental complaint.

Fifth. It denies the allegations contained in paragraph marked or numbered "Seventh" of said amended and supplemental complaint.

For a First Separate and Distinct Defense to the Second Alleged Cause of Action.

Sixth. It admits the allegations contained in paragraphs marked or numbered "Eighth" and "Tenth" of said amended and supplemental complaint.

Seventh. It admits that between November 3rd, 1910, and December 17th, 1913, the plaintiff rendered certain services for the defendant in procuring and executing certain surety bonds and undertakings under a certain contract in writing, for which services the defendant agreed to pay therefor as provided in said contract and not otherwise, as to the terms of which contract defendant begs leave to refer to the original thereof as it shall be produced upon the trial of this action.

101 Except as hereinbefore specifically admitted, it denies each and every allegation contained in paragraph marked or numbered "Ninth" of said amended and supplemental complaint.

Eighth. It admits that the plaintiff procured and executed, on behalf of the defendant, a large number of bonds and undertakings between November 3rd, 1910, and December 17th, 1913, upon which a large number of premiums and renewals thereof were earned by and agreed to be paid to the defendant, upon which premiums said plaintiff became entitled to commissions as provided in the contract hereinbefore referred to and not otherwise, and that during the said period the said plaintiff paid to the defendant certain sums of money, usually accompanied by a statement of alleged premiums collected, upon which statement the said plaintiff had, in each instance, first deducted the amount of his alleged commissions, but this defendant alleges that said statements were not full, accurate or true statements of all premiums due to the defendant.

Except as hereinbefore specifically admitted, it denies each and

every allegation contained in paragraph marked or numbered "Eleventh" of said amended and supplemental complaint.

Ninth. It denies the allegations contained in paragraph marked or numbered "Twelfth" of said amended and supplemental complaint.

For a First Separate and Distinct Defense to the Third Cause of Action.

Tenth. It admits the allegations contained in paragraph marked or numbered "Thirteenth" of the said amended and supplemental complaint.

102 Eleventh. It denies the allegations contained in paragraphs marked or numbered "Fourteenth," "Fifteenth" and "Sixteenth" of said amended and supplemental complaint.

For a Second Separate and Distinct Defense to the Second Alleged Cause of Action.

Twelfth. This defendant begs leave to refer to and reaver each of the allegations, admissions and denials contained in each of the foregoing defenses and to make the same a part of this defense with the same force and effect as if specifically reaverred herein.

Thirteenth. That in the contract between the plaintiff and the defendant, under which the plaintiff claims commissions, as set forth in his amended and supplemental complaint, it was, among other things, provided that the plaintiff should keep true and accurate accounts, of all business done on behalf of the defendant, and should, not later than the 10th day of each calendar month, forward to the home office at Chicago an accurate detailed report of all premiums collected or received by the plaintiff, and not previously reported, remit to the defendant by draft or post office or express money order the net amount due the defendant, and also forward to the defendant all reports of all bonds written and not previously reported.

That it was further provided in the said contract that the plaintiff should write no administrator, guardian, executor, receiver or trustee bonds unless joint control of the assets was secured, or the same was waived by the defendant, and it was further agreed between the plaintiff and the defendant that all collateral received by the plain-

103 tiff upon bonds written by him for or on behalf of the defendant should be forwarded to the home office of the defendant.

Fourteenth. That the plaintiff repeatedly and persistently violated each and every one of the foregoing provisions of said contract until on or about the 17th day of December, 1913, when the defendant, by reason of such violations of the said contract by plaintiff, discharged the said plaintiff and terminated the said contract.

For Further Separate and Distinct Defense to Each Alleged Cause of Action.

Fifteenth. That prior to the commencement of this action, the defendant fully paid, satisfied and discharged any and all claims of every kind whatsoever which the plaintiff had, if any, against the said defendant.

For Further Separate and Distinct Defense and by Way of Counterclaim.

Sixteenth. This defendant begs leave to refer to and reaver each of the allegations, admissions and denials contained in each of the foregoing defenses and to make the same a part of this defense with the same force and effect as if specifically reaverred herein.

Seventeenth. That heretofore and on or about the 21st day of May, 1907, the plaintiff and one Wight V. Abbott, as co-partners became the agents of the defendant in the City of New York, State of New York, for the writing of surety business under a contract in writing for the term of one year beginning June 1st, 1907, and ending June 1st, 1908, by the terms of which contract it was
104 agreed that the plaintiff and the said Abbott were to procure and write surety business for the defendant in conformity to the rules and instructions of the defendant as to the methods and manner of handling the said business and accounts; that on or about the 15th day of August, 1908, the said employment was continued by a contract in writing for the term of three years beginning August 15th, 1908, and ending August 15th, 1911; that the plaintiff and said Abbott entered upon their employment under the aforesaid contracts and continued to act as such agents for the defendant until on or about the 3rd day of November, 1910, when the said Abbott died, and thereafter the plaintiff, as surviving partner, continued as such agent until on or about the 15th day of August, 1911; that on or about the said 15th day of August, 1911, the said plaintiff was continued as agent of the defendant for the purpose aforesaid by a contract in writing for a further period of five years beginning August 15th, 1911, and ending August 15th, 1916, under which contract the plaintiff continued to act as agent for the defendant until on or about the 17th day of December, 1913, when he was discharged for cause, as hereinbefore alleged, and the said contract terminated.

Eighteenth. That in the aforesaid contract entered into between the plaintiff and said Wight V. Abbott and the defendant, dated on or about the 21st day of May, 1907, it was provided, among other things, that the plaintiff and said Wight V. Abbott were to receive a commission of forty per cent (40%) on all premiums which became due and were collected by said Mackey & Abbott, on bonds written during the period covered by said contract, together with a commission of thirty per cent (30%) on all renewal premiums col-

lected on bonds so procured and written during said period;
105 that in the aforesaid contract entered into between the plaintiff and said Wight V. Abbott and the defendant, dated August 15th, 1908, it was provided, among other things, that the plaintiff and said Wight V. Abbott were to receive full compensation for all services rendered the defendant and in full reimbursement for all expenditures by the said agents a commission of thirty-five per cent (35%) on all cash premiums collected with an additional five per cent (5%) on judicial business secured by or through the said agents, which shall have been accepted by the defendant, and the said plaintiff and said Wight V. Abbott agreed to assume the responsibility for all premiums on all new business and all renewals on fidelity bonds which the agents agreed to pay to defendant, within sixty days, whether collected or not, and all renewal premiums on continuous bonds which had no expiration date were agreed to be paid to the defendant when collected, and it was further expressly agreed that, if the defendant returned or rebated the whole or any part of the premium on any bond or undertaking, the said plaintiff and said Wight V. Abbott agreed to repay to the defendant the full amount of commission allowed thereon; that in the aforesaid contract entered into between the plaintiff and the defendant, dated August 15th, 1911, it was provided, among other things, that the plaintiff was to receive in full compensation for all services rendered the defendant and in full reimbursement for all expenditures by the said plaintiff, a commission of thirty-five per cent (35%) on all cash premiums collected, with an additional five per cent (5%) on judicial business secured by or through the said plaintiff, which shall have been accepted by the defendant, and the said plaintiff agreed to assume the responsibility for all premiums on all new business and all renewals on fidelity bonds, which the plaintiff agreed to
106 pay to the defendant within sixty days, whether collected or not, and all renewal premiums on continuous bonds, which had no expiration date, were agreed to be paid to the defendant when collected, and it was further expressly agreed that, if the defendant returned or rebated the whole or any part of the premium on any bond or undertaking, the said plaintiff agreed to repay to the defendant the full amount of commission allowed thereon, and the said plaintiff further agreed to remit and waive his commission on all bonds where losses were sustained by the defendant.

Nineteenth. That during the period in which the plaintiff and said Abbott and the said plaintiff were the agents of the defendant for the writing of surety business as hereinbefore alleged, there was procured, under and by virtue of the aforesaid contracts, applications for bonds, which bonds the defendant wrote, and on which bonds the total premium agreed to be paid by the parties for whom the bonds were written was the sum of $670,586.94, and that the amount of renewal premiums uncollected and premiums refunded, rebated on cancellation or paid to co-insuring companies upon said bonds, except those which were first or original premiums, amounted to $175,317.22.

Twentieth. That the premiums on said business, which were collected by the plaintiff, or which were original premiums, for which the plaintiff was liable to the defendant amounted to the sum of $495,269.72, on which the commissions earned amounted to $185,614.47, leaving a balance of $309,655.25 as the defendant's share of the said premiums.

107 Twenty-first. That there has been paid to the defendant or credits have been allowed by the defendant on account of the aforesaid premiums due it, the sum of $245,700.99, leaving a balance due and owing to the defendant of $63,954.25, no part of which has been paid, although the same has been duly demanded.

For a Further Separate and Distinct Defense and by Way of Counterclaim.

Twenty-second. This defendant begs leave to refer to and reaver each of the allegations, admissions and denials contained in each of the foregoing defenses and to make the same a part of this defense with the same force and effect as if specifically reaverred herein.

Twenty-third. That during the period covered by the contracts hereinbefore alleged and while the plaintiff was acting as the agent of the defendant there was delivered to and received by the plaintiff, as agent of the defendant, from various persons for whom bonds were written by the defendant, large sums of money and other property as collateral security for bonds so written by the defendant, amounting to upwards in amount and value of the sum of $87,235.96.

Twenty-fourth. That the plaintiff has failed and refused to turn over to the defendant the said money and property so received by him as its agent as collateral, upon demand, and has wrongfully converted the same to his own use.

Twenty-fifth. That the amount and value of the money and property so converted by the plaintiff, as aforesaid, is the sum of $87,235.96, and that by reason of the premises defendant has been
108 damaged in the said sum of $87,235.96, no part of which has been paid.

For a Further Separate and District Defense and by Way of Counterclaim.

Twenty-sixth. This defendant begs leave to refer to and reaver each of the allegations, admissions and denials contained in each of the foregoing defenses and to make the same a part of this defense with the same force and effect as if specifically reaverred herein.

Twenty-seventh. That in the contract between the plaintiff and defendant hereinbefore alleged, it was, among other things, stipulated and agreed that the plaintiff should remit and waive his commis-

sion on all bonds where losses were sustained by the defendant, and in all cases where such commission had been paid to or deducted by the plaintiff, the same was to be returned to the defendant.

Twenty-eight. That there was paid by the defendant to the plaintiff or deducted by the plaintiff from moneys in his hands, belonging to the defendant, large sums of money in commissions, and included in the commissions so paid there was a large number of cases in which the defendant sustained losses upon the bonds, where the defendant had paid to the plaintiff or the plaintiff had deducted said commissions.

Twenty-ninth. That the amount of commissions paid to the plaintiff by the defendant or deducted by the plaintiff, as aforesaid, in cases where the defendant sustained losses upon the said bonds amounting to the sum of $2,724.34, no part of which has been paid by the plaintiff to the defendant, although the same has been duly demanded.

109 Thirtieth. That there is now due and owing from the plaintiff to the defendant by reason of the foregoing facts the sum of $2,724.34.

Wherefore, defendant demands judgment dismissing the amended and supplemental complaint of the plaintiff and judgment in its favor against the plaintiff for the sum of $153,914.56, with interest thereon from the 17th day of December, 1913, together with the costs and disbursements of this action.

KELLOGG & ROSE,
Attorneys for Defendant.

Office & Post Office Address, 115 Broadway, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

L. Laflin Kellogg, being duly sworn, deposes and says, that he is one of the members of the firm of Kellogg & Rose, attorneys for the defendant in the above-entitled action, which is a foreign corporation.

That he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by the defendant is that the said defendant is a foreign corporation and none of its officers are now within the City and County of New York, where deponent resides and has his office.

That the sources of deponent's knowledge and the ground of his belief as to all matters therein stated to be alleged upon in-
110 formation and belief, are derived from an examination of the various contracts referred to in said answer, the books and accounts kept by the parties and from oral and written statements

made by the various officers, agents and accountants of the defendant familiar with the facts in connection with the subject'-matters of the action.

L. LAFLIN KELLOGG.

Sworn to before me this 20th day of December, 1917.

WM. H. O'BRIEN,
Notary Public, Westchester County.

New York Co. Clerk's No. 12.
New York Co. Register's No. 8022.

Reply.

Supreme Court of the State of New York, County of Kings.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

The plaintiff, David Clinton Mackey, by Wilder, Ewen & Patterson, his attorneys, replying to the answer to the amended and supplemental complaint, respectfully shows and alleges as follows:

First. He denies the allegation in paragraph Eight that the 111 statements of premiums therein referred to, were not full, accurate or true statements of all premiums due the defendant, and each of the said allegations.

Second. He denies the allegations and each of them, contained in the Thirteenth paragraph of the answer, that in the contracts referred to therein, it was agreed between the plaintiff and the defendant that all collateral received by the plaintiff upon bonds written by him for or on behalf of the defendant, should be forwarded to the home office of the defendant, and as to the other terms and provisions of the said contract, he alleges that the same was in writing and refers to the same when the same shall be produced upon this trial.

Third. He denies each and every allegation in the Fourteenth paragraph contained.

Fourth. He denies each and every allegation in the Fifteenth paragraph contained.

Fifth. Replying to the allegations in the Seventeenth paragraph he denies that in the contract entered into between the defendant and the plaintiff, covering the period from June 1st, 1907, and June 1st, 1908, it was agreed that the plaintiff should procure and write surety business for the defendant in conformity with the rules and instructions of the defendant as to the methods and manner of

handling the said business, and denies that the plaintiff was discharged from said employment for cause.

Sixth. Replying to the allegations contained in the Eighteenth paragraph, he denies that it was agreed that the commissions therein referred to were to be received in full compensation for all services rendered and in full for all expenditures made by the plain-
112 tiff. He denies that the terms and conditions of the said contracts are fully set or correctly set forth in the said paragraph, and begs leave to refer to the same when the same shall be produced on the trial of this action.

Seventh. Replying to the allegations of the Nineteenth paragraph of the said answer, he admits that during the period in which the plaintiff and the said Abbott were the agents of the defendant for the writing of surety business, there was procured under and by virtue of the aforesaid contracts, applications for bonds, which bonds the defendant wrote. He denies each and every other allegation in said paragraph contained.

Eighth. He denies the allegations and each of them contained in the Twentieth paragraph.

Ninth. Replying to the allegations contained in the twenty-first paragraph, he admits that there has been paid to the defendant, or credits have been allowed by the defendant on account of the aforesaid premiums due it. He denies each and every other allegation therein contained.

Tenth. Replying to the allegations contained in the Twenty-third paragraph of the answer, he admits that during the said period, and while acting as agent for the defendant there were delivered to and received by the plaintiff as the agent of the defendant, sums of money as collateral, and denies that the same amounted to upwards in amount and value of the sum of $87,235.96.

Eleventh. He denies the allegations contained in the Twenty-fourth and Twenty-fifth paragraphs and each of them.

113 Twelfth. He denies the allegations contained in paragraph Twenty-seventh of the answer and each of them.

Thirteenth. Replying to the allegations contained in the Twenty-eighth paragraph, he admits that there was paid by the defendant to the plaintiff, or deducted by the plaintiff from moneys in his hands belonging to the defendant, large sums of money in commissions. He denies that he has any knowledge or information thereof sufficient to form a belief of the other allegations in the said paragraph contained.

Fourteenth. He denies the allegations and each of them contained in the Twenty-ninth and Thirtieth paragraphs of the answer.

For a Separate and Distinct Defense to the First Counterclaim.

Fifteenth. This plaintiff alleges that throughout the period of the agency therein set forth, the plaintiff rendered to the defendant from time to time statements setting forth the premiums collected by him, or for which he was accountable, from which amounts shown there were deducted the amount of the plaintiff's commissions thereon, and in which the plaintiff took credit for various sums paid by the plaintiff for the account of the defendant or credits to which the plaintiff claimed to be entitled, as against the said premiums, and in case a balance was shown, the said statements were accompanied by a cheque to the defendant's order for such balance, which statements and cheques were received and retained by the defendant in full settlement and payment for the premiums shown in the said statements, and that the said statements and payments so
114 made constituted accounts stated in accord and satisfaction for all premiums shown in the said statements, and thereby the plaintiff paid to the defendant the amount of all premiums for which he was liable to the defendant during the period of the said agency.

For a second separate defense to the first counterclaim, the plaintiff alleges:

Sixteenth. That he has paid to, or to the account of, the defendant, all premiums for which he was liable or accountable during the period of the said agency.

Replying to the second counterclaim, this plaintiff alleges:

Seventeenth. That he has either paid to the defendant, or acting as agent for the defendant, has paid out for its account, or has accounted to the defendant, for all collateral received by him during the period of the said agency.

For a separate and distinct defense to the third counterclaim the plaintiff alleges:

Eighteenth. That prior to the commencement of this action, the plaintiff has paid to the defendant or given to the defendant credit for all premiums on bonds upon which the defendant had suffered losses, and for which the plaintiff was liable under his agreement with the defendant.

115 For a separate defense to the first and second counterclaims, the plaintiff alleges:

Nineteenth. That in an action now pending between the parties hereto, the defendant herein alleged the first and second counterclaims hereto, which action is still pending, and that by order entered herein on the 21st day of November, 1917, by which the plaintiff was permitted to serve a supplemental complaint, and the defendant permitted to reply thereto, it was ordered

"that only the excess of the counterclaims in Action No. 1 over the amount, if any, found due on the plaintiff's cause of action in Action No. 1, shall apply to or be allowed as a set off in this action, and the amount thereof, if any, so applied as a set off in this action, shall be allowed to the plaintiff herein as a credit upon any judgment recovered by the plaintiff in Action No. 1."

That the issues in the said Action No. 1 have not yet been fully tried, and the said action is still pending.

Wherefore, the plaintiff demands judgment dismissing the counterclaims and for the judgment prayed for in the complaint, together with the costs and disbursements of this action.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

45 Cedar Street, Borough of Manhattan, City of New York.

116 STATE OF NEW YORK,
County of New York, ss:

David Clinton Mackey, being duly sworn, deposes and says that he is the plaintiff herein; that he has read the foregoing reply and knows the contents thereof; that the same is true to his own knowledge except as to those matters which are therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

DAVID CLINTON MACKEY.

Sworn to before me this 15 day of January, 1918.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 170.
New York Register No. 8138.
Kings County No. 30.
Kings Register No. 8059.

117 *Order.*

At a Special Term, Part I, of the Supreme Court of the State of New York Held in and for the County of Kings, in the Kings County Court House, in the Borough of Brooklyn, City of New York, on the 1st Day of May, 1919.

Present: Hon. Isaac M. Kapper, Justice.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

A motion having been made by the plaintiff for an order appointing a referee in the place and stead of the deceased referee herein, to hear and determine the issues in this action, and the said motion having come on duly to be heard, and after hearing William M. Patterson, Esq., of counsel for the plaintiff, in support of said motion, and no one appearing in opposition thereto,

Now, on reading and filing the notice of said motion, dated April 25, 1919, together with the affidavit of John Ewen, verified April 25, 1919, thereto annexed, with due proof of service thereof; and upon reading the pleadings and the order entered herein on November 21, 1917, and the stipulation thereto annexed, in support of the said motion, it is, on motion of Wilder, Ewen & Patterson, Esqrs., attorneys for the plaintiff,

118 Ordered, that the said motion be and the same hereby is granted, and that James MacGregor Smith, Esq., attorney at law, be and he hereby is appointed referee, to hear and determine the issues in this action, in place and stead of Wilbur Larremore, Esq., deceased. And it is further

Ordered, that the referee may hold hearings on said reference in the Borough of Manhattan, City of New York.

Enter,

I. M. K.,
J. S. C.

Granted May 1, 1919.

WILLIAM E. KELLY,
Clerk.

Affidavit of Syrena H. Stackpole.

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Syrena H. Stackpole, being duly sworn, deposes and says, that on the 8th day of May, 1919, at #115 Broadway, Borough of
119 Manhattan, City, County and State of New York, she served the annexed notice of trial before referee on Kellogg & Rose, attorneys for the defendant in the above-entitled action, by delivering a true copy thereof to and leaving it with Philip M. Brett, personally, a member of the firm of Kellogg & Rose, attorneys for the defendant as aforesaid. That deponent knew the said Philip M. Brett and that he was a member of the said firm.

That deponent is over twenty-one years of age.

SYRENA H. STACKPOLE.

Sworn to before me this 9th day of May, 1919.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register's No. 10067.
Kings County No. 7.
Kings Register No. 134.

120 *Affidavit of Rudolph Dugan.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Rudolph Dugan, being duly sworn, deposes and says:

That on the 8th day of May, 1919, he served the annexed notice of trial before referee on the Illinois Surety Company, the defendant

in the above-entitled action, by enclosing a copy of the same in a securely closed postpaid wrapper directed to the said Illinois Surety Company, c/o A. J. Hopkins, 134 La Salle Street, Chicago, Illinois, and depositing the same in the United States Post Office, Wall Street Branch, at the corner of Pine and Pearl Streets, in the Borough of Manhattan, City, County and State of New York. That the address of the said Illinois Surety Company as aforesaid is the last known address of the defendant given in the proceedings in the above-entitled action. That deponent is over twenty-one years of age.

RUDOLPH DUGAN.

Sworn to before me this 23rd day of May, 1919.
L. E. MacARTHUR,
Notary Public, No. 221.

New York County Register's No. 1120.
Commission expires March 30, 1921.

121 *Notice of Trial.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

SIRS:

Please take notice that the issues in the above-entitled action will be brought on for trial before Hon. James MacGregor Smith, the referee duly appointed herein by order of this Court, dated May 1st, 1919, at his office #32 Nassau Street, Borough of Manhattan, City of New York, on the 26th day of May, 1919, at two o'clock in the afternoon of that day, and that a motion will be made before the referee for a judgment in favor of the plaintiff and dismissing the defendant's counterclaims.

Dated, May 8, 1919.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

45 Cedar Street, Borough of Manhattan, City of New York.

To: Messrs. Kellogg & Rose, Attorneys for Defendant; Illinois Surety Company, Defendant.

122 *Affidavit of James MacGregor Smith.*

Supreme Court, Kings County.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

James MacGregor Smith, the referee appointed herein, by order entered the 2nd day of May, 1919, being duly sworn, says, that he will faithfully and fairly try the issues and determine the questions referred to him and make a just and true report according to the best of his understanding.

JAS. MACGREGOR SMITH.

Sworn to before me this 7th day of May, 1919.

FLORENCE A. O'BRIEN,
Notary Public, #7, N. Y. Co.

123 *Referee's Report.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

To the Supreme Court of the State of New York:

I, James MacGregor Smith, to whom by order of this Court, made on the first day of May, 1919, it was referred to hear and determine the issues in this action, do respectfully report:

That before proceeding to hear the testimony I was sworn, as prescribed by Section 1016 of the Code of Civil Procedure.

That the plaintiff appeared before me by Messrs. Wilder, Ewen & Patterson, his attorneys, John Ewen, of counsel, and filed notice of trial with due proof of service on the defendant, and that the defendant failed to appear.

That the plaintiff submitted proofs of the allegations of the complaint, and moved to dismiss the counterclaims contained in the answer.

I have heard and considered such proofs and upon such proofs, I do find the following facts:

124 *Findings of Facts.*

I. That at all the times mentioned in the complaint the defendant was and is a foreign corporation duly organized under the laws of the State of Illinois, and having an office and place of business in the City and State of New York.

II. Between August 15, 1908, and November 3, 1910, the plaintiff and one Wight V. Abbott were co-partners doing business under the firm name of "Mackey & Abbott."

III. That on August 15, 1908, the defendant entered into a written contract with the said Mackey & Abbott, by which it appointed the said Mackey & Abbott its general agents for the territory of Greater New York, for the purpose of procuring applications for bonds and undertakings, and to collect premiums and to perform other duties enumerated therein, for a period of three years, ending August 15, 1911, and for such services it was agreed that the defendant should pay to the said Mackey & Abbott a commission of thirty-five per cent (35%) on all cash premiums collected, and an additional five per cent (5%) on judicial business secured by or through them. It being further provided that the said agents should be entitled to the full commissions on all premiums, whether collected by them or the defendant after the termination of the agency for any reason.

It being also provided in said contract that the agents should be responsible for and pay to the defendant premiums on new business and renewals on fidelity bonds which must be paid to the company within sixty days, whether collected or not.

IV. That the said Mackey & Abbott acted as agents under such contract until November, 1910, when the said Abbott died.
125 and all of his interest under said contract was assigned to the plaintiff, and the plaintiff thereafter continued to act under the said contract as agent for the defendant until its expiration August 15, 1911.

That on August 15, 1911, a new contract was entered into in writing, between the plaintiff and the defendant, upon the same terms as to compensation as the prior contract, by which the plaintiff was appointed and continued as such agent for an additional period of five years. The plaintiff continued to act as such agent until the agency was terminated by the parties on December 18, 1913. That during the period of such agency Mackey & Abbott and the plaintiff procured the execution of surety bonds and undertakings for the defendant, upon which premiums became due, both during the period of the agency and thereafter, until the service of the amended and supplemental complaint herein.

V. That between December 9, 1914, and January 1, 1917, the defendant collected premiums upon judicial bonds procured as afore-

said, in the sum of $7,648.26. upon which the commissions at forty per cent, in accordance with the contract amounted to $3,059.30.

The defendant also received premiums between the said dates upon other bonds and undertakings procured as aforesaid, in the amount of $80,863.05, upon which the commissions at thirty-five per cent, in accordance with the terms of the contract, were the sum of $28,302.06.

VI. That between March 23, 1914, and March 1, 1915, the plaintiff, at the instance and request of the defendant, performed work, labor and services as a broker in procuring for the defendant
126 certain bonds for execution by it, and the payments to the defendant for execution of such bonds and the customary and agreed broker's compensation for such services, was twenty-five per cent of the amount of such premiums, and the defendant agreed to pay to the plaintiff twenty-five per cent of the premiums so received upon such bonds as compensation for such services.

VII. That the bonds so procured by the plaintiff for execution by the defendant, and the premiums paid thereon were as follows:

Administration bond, Kate Hartkopf:

Amount of 1st premium	$160.00
Renewal premium	106.07
Undertaking in action of Lord & Taylor vs. Hatch, premium	1,673.00
Bond of Augustus R. Keller, premium	40.00
Bond for George Rector, Inc., premium	13.00
That the total of such premiums was the sum of	$1,992.07

and that the commission of twenty-five per cent thereof was the sum of $498.02.

Conclusions of Law.

I. That the plaintiff became entitled to commissions at the rate of forty per cent upon the amount of judicial premiums collected as heretofore found, and a commission at the rate of thirty-five per cent upon premiums other than judicial premiums.

II. That the plaintiff became entitled to commissions of twenty-five per cent upon the premiums on bonds procured by him
127 for the defendant as broker, and which were paid to the defendant.

III. That the counterclaims set up in the defendant's answer should be dismissed.

IV. That the plaintiff is entitled to judgment against the defendant dismissing the counterclaim set up in the answer, and for the sum of $31,859.38, with interest thereon from January 1, 1917, amounting to $4,662.08, making a total of $36,521.46, and for the

costs of this action to be taxed, and directing that execution be issued therefor.

And I direct that judgment be entered hereon in accordance with the foregoing findings and conclusions.

Dated, New York, June 9, 1919.

JAS. MacGREGOR SMITH,
Referee.

Certificate of Referee's Fees (Summarized).

This was a certificate signed by James MacGregor Smith, Referee, dated June 20, 1919, as to the correct amount of his fees.

Its printing in full is dispensed with as not being material to the issues in this action.

128 *Judgment.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

The issues in the above-entitled action having been duly referred to James MacGregor Smith, Esq., as Referee, to hear and determine the same, by order entered herein May 1, 1919; and the plaintiff having appeared by Wilder, Ewen & Patterson, Esqrs., his attorneys, and having filed notice of trial with proof of due service on the defendant; and the defendant having failed to appear, and the plaintiff having submitted proofs of the allegations of the complaint, and having moved to dismiss the counterclaims contained in the answer; and the Referee having made and filed his report herein, dated June 9, 1919, on June 21, 1919, stating his findings of fact and conclusions of law herein, and having directed judgment in favor of the plaintiff and against the defendant, dismissing the counterclaims set up in the answer, and for the sum of Thirty-one thousand eight hundred and fifty-nine 38/100 Dollars with interest thereon from January 1, 1917, amounting to the sum of Four thousand six hundred and sixty-two 08/100 Dollars ($4,662.08) making a total of
129 Thirty-six thousand five hundred twenty-one and 46/100 Dollars ($36,521.46), and for the costs of the action to be taxed; and the costs having been taxed at the sum of $520.49/100 Dollars.

Now, on motion of Wilder, Ewen & Patterson, attorneys for the plaintiff, it is

Adjudged, pursuant to the report of James MacGregor Smith, the Referee, dated June 9, 1919, that the counterclaims set up in the answer be dismissed, and that the plaintiff, David Clinton Mackey, recover of the defendant, Illinois Surety Company, the sum of Thirty-

one thousand eight hundred and fifty-nine 38/100 Dollars ($31,859.38), with interest thereon from January 1, 1917, amounting to the sum of Four thousand six hundred and sixty-two 08/100 Dollars ($4,662.08), making a total of Thirty-six thousand five hundred and twenty-one 46/100 Dollars ($36,521.46), together with the sum of Five hundred & twenty & 49/100 Dollars costs as taxed, making a total of Thirty-seven thousand & forty-one 95/100 dollars and that the plaintiff have execution therefor.

Dated, City of New York, June 21, 1919.

WILLIAM E. KELLY,
Clerk.

130 PLAINTIFF'S EXHIBIT 2.

New York Supreme Court, Kings County.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

SIRS:

Please take notice that upon the annexed affidavit of John Ewen, verified April 25th, 1919, and upon the pleadings, and upon the order entered herein November 21st, 1917, appointing the receiver, and the stipulation thereto annexed the undersigned will move this Court at a Special Term, Part I thereof, to be held in the Kings County Court House, Borough of Brooklyn, City of New York, on the 1st day of May, 1919, at 10 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, for an order appointing a Referee to hear and determine the issues herein in place and stead of Wilbur Larremore, Esq., Referee, heretofore appointed herein, and since deceased, and also for such other and further relief as may be just and proper.

Dated, April 25, 1919.

Yours, etc.,

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

45 Cedar Street, Borough of Manhattan, New York City.

To: Messrs. Kellogg & Rose, Attorneys for Defendant.

131 *Affidavit of John Ewen.*

New York Supreme Court, Kings County.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant,

STATE OF NEW YORK,
County of New York, ss:

John Ewen, being duly sworn, deposes and says: I am one of the attorneys for the plaintiff in the above-entitled action. This action was commenced by service of the summons and complaint on May 15th, 1915. The amended answer was served on June 25th, 1915, and a reply thereto served July 6th, 1916. On November 21st, 1917, an order was entered herein providing for the service of amended and supplemental pleadings, and the issues raised by such pleadings were referred to Wilbur Larremore, Esq., counsellor at law, as Referee, to hear and determine the same.

Hearings were had before Mr. Larremore, the Referee, and the reference was closed on July 24th, 1918. Before the Referee had decided the case, however, or filed his report, he died on August 11th, 1918. Thereafter I requested the attorneys for the defendant to agree upon a new Referee, and at their request on February 26th, 1919, I wrote suggesting the names of proposed Referees, but they have not, however, agreed, and I accordingly ask that an

132 order be made appointing a new Referee in place of the deceased Referee, to hear and determine the issues in this action.

JOHN EWEN.

Sworn to before me this 25th day of April, 1919.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register No. 10067.
Kings County No. 7.
Kings Register No. 134.

Affidavit of Service.

New York Supreme Court, Kings County.

Action #2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant,

Affidavit of Service.

STATE OF NEW YORK,
County of New York, ss:

Syrena H. Stackpole, being duly sworn, says, that on the 26th day of April, 1919, at 115 Broadway, in the Borough of Man-
133 hattan, City of New York, she served a copy of the annexed affidavit and notice of motion to appoint referee, returnable May 1, 1919, upon Kellogg & Rose, to her known to be the attorneys for the defendant herein, by delivering the same to and leaving it with Alfred C. Pettee, a member of the firm of Kellogg & Rose.

SYRENA H. STACKPOLE.

Sworn to before me this 28th day of April, 1919.
RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register No. 10067.
Kings County No. 7.
Kings Register No. 134.

PLAINTIFF'S EXHIBIT 3.

Assignment of Judgment.

This indenture, made the twenty-first day of June, one thousand nine hundred and nineteen, Between David Clinton Mackey of the Borough of Brooklyn, City of New York, party of the first part, and John Ewen, of New York City, New York, party of the second part, witnesseth:

Whereas, David Clinton Mackey, party of the first part, on the 21st day of June, one thousand nine hundred and nineteen recovered a judgment in the Supreme Court of the State of New York, County of Kings, in an action entitled "David Clinton Mac-
134 key, plaintiff, against Illinois Surety Company, defendant, Action No. 2," in the sum of $37,041.95, and that such

judgment was duly filed and docketed on the 21st day of June, 1919, in the office of the Clerk of the County of Kings, New York,

Now this indenture witnesseth, that the said party of the first part, in consideration of one dollar and other good and valuable consideration, to him duly paid, has sold, and by these presents does assign, transfer, and set over unto the said party of the second part, and his assigns, the said judgment, and a sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon.

And the said party of the first part, does hereby constitute and appoint the said party of the second part, and his assigns his true and lawful attorney irrevocable, with power of substitution and revocation for the use, and at the proper costs and charges of the said party of the second part, to ask, demand and receive and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on the said judgment; and on payment to acknowledge satisfaction, or discharge the same. And attorneys one or more under him for the purpose aforesaid, to make and substitute, and at pleasure to revoke, hereby ratifying and confirming all that his said attorney or substitute shall lawfully do in the premises. And the said party of the first part does covenant that there is now due on said judgment the sum of $37,041.95 dollars, and that he will not collect or receive the same, or any part thereof, nor release or discharge the said judgment but will own or allow all lawful proceedings therein, the said party of the second part saving the
135 said party of the first part harmless of and from any costs and charges in the premises.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

DAVID CLINTON MACKEY.

Sealed and delivered in the presence of

——— ———.

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of June in the year of our Lord one thousand nine hundred and nineteen before me the undersigned, personally came and appeared David Clinton Mackey, to me personally known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

RUDOLPH DUGAN,
Notary Public, Nassau County

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register No. 10067.
Kings County No. 7.
Kings Register No. 134.

136 PLAINTIFF'S EXHIBIT 4.

Assignment of Cause of Action.

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant,

Know all men by these presents, that:

Whereas, American Fidelity Company, duly executed its undertaking, dated July 9, 1915, discharging an attachment issued in the above-entitled action, which said undertaking was duly approved and filed in the office of the Clerk of the County of Kings on July 10, 1915, by which the said American Fidelity Commpany became obligated in the sum of Seven thousand five hundred Dollars ($7,500) that the defendant herein would, on demand, pay to the plaintiff the sum of any judgment which might be recovered herein against the defendant not exceeding the said sum of Seven thousand five hundred Dollars ($7,500), with interest; and

Whereas, the undersigned David Clinton Mackey, has on this 21st day of June, 1919, recovered judgment against the defendant in a sum in excess of $7,500 with interest, which said judgment has been assigned to John Ewen of the City of New York.

137 Now, therefore, in consideration of the premises and of the sum of One Dollar and other good and valuable considerations to me in hand duly paid by the said John Ewen, I, David Clinton Mackey, the plaintiff in the above-entitled action, do hereby for myself, my personal representatives and assigns, duly assign and transfer and make over to the said John Ewen all of my rights against the said America Fidelity Company, its successors and assigns, under the said undertaking, any cause of action or right of action which I have or may have against the said American Fidelity Company, and I do hereby nominate, constitute and appoint the said John Ewen lawful attorney for me, in my or his name, at his proper cost and expense to demand, sue for, collect and give acquittance under the said undertaking, and to take any and all action necessary in enforcing any rights thereunder.

In witness whereof, I have hereunto set my hand and seal this 21st day of June, nineteen hundred and nineteen.

DAVID CLINTON MACKEY. [L. S.]

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of June, 1919, before me personally came and appeared David Clinton Mackey, to me known and known to me to

be the person described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register No. 10067.
Kings County No. 7.
Kings Register No. 134.

138 PLAINTIFF'S EXHIBIT 5.

Affidavit of Service.

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Elizabeth Sinnott, being duly sworn, deposes and says that she is over the age of twenty-one years.

That on June 23rd, 1919, she served the annexed demand for payment of judgment upon the Illinois Surety Company, by enclosing a true copy of the said annexed demand in a securely closed postpaid wrapper, addressed and directed to the Illinois Surety Company c/o James S. Hopkins, Receiver, #134 La Salle Street, Chicago, Illinois, and depositing the same, enclosed in the wrapper as aforesaid, in the letter box under the care, custody and control of the United States Government in the building at #45 Cedar Street in the Borough of Manhattan, City, County and State of New York.

That deponent was requested to serve the said demand as
139 aforesaid by Mr. John Ewen, attorney at law, 45 Cedar Street, Borough of Manhattan, City of New York.

ELIZABETH SINNOTT.

Sworn to before me this 17th day of December, 1919.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register No. 10067.
Kings County No. 7.
Kings Register No. 134.

Affidavit of Service.

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss.:

Elizabeth Sinnott, being duly sworn, deposes and says that she is over the age of twenty-one years.

140 That on June 23rd, 1919, she served the annexed demand for payment of judgment upon the Illinois Surety Company, by enclosing a true copy of the said annexed demand in a securely closed postpaid wrapper, addressed and directed to the Illinois Surety Company, c/o A. J. Hopkins, #134 La Salle Street, Chicago, Illinois, by depositing the same enclosed in the wrapper as aforesaid, in the letter box under the care, custody and control of the United States Government in the building at #45 Cedar Street, in the Borough of Manhattan, City, County and State of New York. That deponent was requested to serve the said demand as aforesaid by Mr. John Ewen, attorney at law, 45 Cedar Street, Borough of Manhattan, City of New York.

ELIZABETH SINNOTT.

Sworn to before me this 17th day of December, 1919.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificates filed in New York & Kings Counties.
New York County No. 84.
New York Register No. 10067.
Kings County No. 7.
Kings Register No. 134.

141 *Affidavit of Service.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Rudolph Dugan, being duly sworn, deposes and says that he is over the age of twenty-one years.

That on June 23rd, 1919, at #115 Broadway, Borough of Manhattan, City of New York, he served the annexed demand upon Messrs. Kellogg & Rose, attorneys for the defendant in the above-entitled action, by delivering a copy of the same to and leaving it with Philip Brett, personally, a member of the firm of said Kellogg & Rose, attorneys for the defendant as aforesaid.

RUDOLPH DUGAN.

Sworn to before me this 16th day of December, 1919.

L. E. MACARTHUR.
Notary Public, No. 221, New York County.

Register's No. 1120.
Commission expires March 30, 1921.

142 *Demand for Payment of Judgment.*

Supreme Court of the State of New York, County of Kings.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

against

ILLINOIS SURETY COMPANY, Defendant.

To the Illinois Surety Company:

Please take notice that judgment in the above-entitled action having been entered herein on June 21, 1919, in favor of the plaintiff and against the defendant for the sum of Thirty-seven thousand and forty-one 95/100 Dollars ($37,041.95) the said judgment having been duly assigned to the undersigned by assignment, dated and filed June 21, 1919, that demand is made upon you that you pay

the amount of the said judgment, with interest, to the undersigned.
Dated, June 23, 1919.
Yours, etc.,

JOHN EWEN.

45 Cedar Street, Borough of Manhattan, City of New York.

143 PLAINTIFF'S EXHIBIT 6A.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County. In Chancery.

General Number 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Petition.

To the Honorable Denis Sullivan, judge of said court:

Your petitioner, James S. Hopkins, Receiver of the Illinois Surety Company, respectfully represents unto your Honor as follows:

1. That your petitioner was heretofore appointed by this Honorable Court Receiver of the Illinois Surety Company, a corporation; that he has duly qualified as such receiver and ever since has been and is now acting as such receiver;

2. That heretofore, at the time of his said appointment, your petitioner took possession of the premises heretofore occupied by said Illinois Surety Company, as its place of business in the Corn Exchange Bank Building, Number 136 South La Salle Street, Chicago, Illinois, and ever since has been and is now occupying said premises.

3. That prior to the appointment of your petitioner as such receiver, the said Illinois Surety Company occupied said prem-
144 ises under a lease with said Corn Exchange Bank Building at a monthly rental of Four hundred and eighty-seven dollars and fifty cents ($487.50), which said lease will expire by its terms on May 1st, 1918.

4. That your petitioner is desirous of reducing the overhead expense of carrying on the business of the said Illinois Surety Company, and considers it advisable to reduce said rental insofar as it seems practical so to do, without sacrificing or in any manner reducing the value of the property and good will of said Illinois Surety Company.

5. That said Illinois Surety Company has carried on its business and maintained its principal office and place of business at said location almost throughout its entire existence; that its address and location at said premises has become familiarly known to a great number of its agents, who constantly visits its said offices, to the extent of from ten (10) to twelve (12) in number per day, for the purpose of transacting their business with the said company; that claimants—in like manner, have become acquainted with the location of said Illinois Surety Company at said premises, and in like manner visit said premises to the extent of three (3) and four (4) in number per day; that said premises are conveniently located with reference to the central business and financial district of the said City of Chicago.

6. That in addition to the advantages enumerated which will be of benefit to your petitioner in continuing the business of said Illinois Surety Company in said premises, there are a number of disadvantages which would result from moving said business from its said present location, and chiefly is the inconvenience and expense; that the fixtures and filing system of the said Illinois Surety
145 Company has become very elaborate and extensive, and now consists of approximately two hundred thousand (200,000) files, contained in steel filing cases; that the removal and re-establishment of said office in other premises would entail an expense of at least Two thousand dollars ($2,000.00) and would result in the serious interruption of business and possible loss and irreparable damage.

7. That for the reasons above enumerated, it seems advisable to your petitioner to remain in said premises, provided he could reduce the rental; to that end your petitioner has procured from said Corn Exchange Bank Building an offer, by which it proposes to reduce the space now occupied by your petitioner in carrying on said business to a space which is considerably smaller, but which will suit the needs of your petitioner, cancel said former lease with said Illinois Surety Company, and rent said reduced space to your petitioner as said receiver at a monthly rental of Two hundred and seventy-five dollars ($275.00) under a lease to expire upon the same day as said former lease, to wit, May 1st, 1918.

8. That your petitioner desired to be guided in the premises by the instructions and directions of this Honorable Court.

Wherefore, your petitioner prays that leave be granted him by this Honorable Court to accept said proposal of said Corn Exchange Bank Building and to make and enter into said proposed lease upon the terms hereinabove stated; and your petitioner will ever pray, etc.

JAMES S. HOPKINS,
Receiver of the Illinois Surety Company.

146 STATE OF ILLINOIS,
County of Cook, ss:

James S. Hopkins, receiver of Illinois Surety Company, being first duly sworn, upon his oath deposes and says that he has read the above and foregoing petition by him subscribed, and that the same is true, in substance and in fact.

JAMES S. HOPKINS,
Receiver of the Illinois Surety Company.

Subscribed and sworn to before me this 6th day of July, A. D., 1916.

[Seal of Notary Public.] EVA STREET,
Notary Public.

Filed Jul. 7, 1916.
RICHARD J. McGRATH,
Clerk,
Per P.

(July exemplified.)

PLAINTIFF'S EXHIBIT 6B.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Plas. before the Honorable Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County and State on the first Monday, being at the Court House in the City of Chicago in said county and state on the first Monday being the third day of July, in the
147 year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America, the one hundred and fortieth.

Present:

The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook County.
Malay Hoyne, State's Attorney.
John E. Traeger, Sheriff of Cook County.

Attest:
RICHARD J. McGRATH,
Clerk.

Be it remembered that heretofore, to wit: on the 10th day of July, in the year of our Lord one thousand nine hundred and sixteen the same being one of the days of the July Term of the Superior Court of Cook County the following among other proceedings were had in said Court and entered of record, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

In Chancery.

General No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Order.

This cause coming on to be heard upon the petition of James S. Hopkins, receiver herein, for leave to accept the proposal of the Corn Exchange Bank Building to cancel its lease with said
148 Illinois Surety Company and rent to said receiver a smaller space in said building, suitable to the needs of said receiver, at a monthly rental of Two hundred and seventy-five dollars ($275.00), under a lease to expire May 1st, 1918, and the Court having examined said petition heard the arguments of counsel and now being fully advised in the premises, and all the parties to said cause being either present in court by their respective solicitors or having received notice of the filing of said petition and having failed to appear, it is hereby ordered that leave be and the same is hereby given to said James S. Hopkins, receiver of said Illinois Surety Company herein, to continue and carry on the business of said Illinois Surety Company under the directions of this Court in said Corn Exchange Bank Building, at 136 South La Salle Street, Chicago, Illinois, until the further order of this Court; and it is hereby further ordered that leave be and the same is hereby given to the said James S. Hopkins, receiver as aforesaid, to accept the said proposal of said Corn Exchange Bank Building to cancel the said old lease of the Illinois Surety Company and make and enter into a written lease with said Corn Exchange Bank Building, for a smaller space at said former location, at a monthly rental of Two hundred and seventy-five dollars ($275.00), said lease to expire on May 1st, 1918.

Enter, DENIS E. SULLIVAN,
Judge of the Superior Court of Cook County.

Filed Jul- 10, 1916.
RICHARD McGRATH,
Clerk.

(Duly exemplified.)

149 PLAINTIFF'S EXHIBIT 6c.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Pleas, before the Honorable Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of the said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County, and State on the first Monday, being the fourth day of February, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America, the one hundred and forty-second.

Present:

The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook County.
Maclay Hoyne, State's Attorney.
John E. Traeger, Sheriff of Cook County.

Attest:
JOHN KJELLANDER,
Clerk.

Be it remembered that heretofore, to wit: on the 20th day of February, in the year of our Lord one thousand nine hundred and eighteen the same being one of the days of the February Term of the Superior Court of Cook County the following among other proceedings were had in said court and entered of record, to wit:

150 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 321,884.

H. H. EVANS, et al.

vs.

ILLINOIS SURETY COMPANY.

Order.

The petition of James S. Hopkins, receiver of the Illinois Surety Company, coming on to be heard, wherein he states that the order of this Court entered on the 30th day of January, 1918, giving him as receiver certain directions touching cases against the Illinois

Surety Company, and him as receiver, pending in various courts in the different states in which the Illinois Surety Company was doing business while it was a going concern, has been misconstrued by people interested in such suits, and who claim that it relates to suits pending in the Appellate Courts of the various States and Federal Court and whereas it was not the intention of the Court in entering said order to interfere with the proper prosecution or defense of any suits pending in an Appellate Court in any State in which the Illinois Surety Company was doing business when it was a going concern, or in a Federal Court in which any such suit is pending.

And whereas said order properly construed is not susceptible of such interpretation, but inasmuch as some question has been
151 raised as to the extent of the limitations upon the power of the receiver to prosecute and defend suits, and to make the same clear, so that all parties interested may understand the order of this Court in the premises, it is hereby ordered and decreed that said order of January 30, 1918, has no application to any suit pending in any Appellate Federal Court or in any Appellate Court of any State in which the Illinois Surety Company was doing business when it was a going concern, and it has no application to any suit that was commenced in any court or is now pending in any court wherein the Illinois Surety Company is plaintiff, or James S. Hopkins as receiver of the Illinois Surety Company is plaintiff.

Enter,

DENIS E. SULLIVAN,
Judge.

Filed Feb. 20, 1918.
JOHN KJELLANDER,
Clerk,

Per F.

(Duly exemplified.)

152 PLAINTIFF'S EXHIBIT 6D.

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

Gen. No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Petition on Behalf of Receiver for Authority to Settle the Claim of Messrs. Kellogg & Rose of New York City for Legal Services.

Your petitioner, James S. Hopkins, represents unto your Honor that while the Illinois Surety Company was a going concern, that it

did a large business in the City and State of New York; that it had a good deal of litigation in the State of New York, and that it retained the firm of Messrs. Kellogg & Rose, 115 Broadway, New York City, as general counsel in the State of New York and that that firm acted for the Illinois Surety Company for a number of years on all the principal litigation in the City of New York prior to the appointment of your petitioner as receiver on the 19th day of April, 1916.

He further states that at the time said company was dissolved and your petitioner was appointed receiver that a large number of cases were pending in the different courts in the City of New York and a number of them in the Court of Appeals at Albany, in which cases Messrs. Kellogg & Rose appeared as attorneys.

153 He further states that Messrs. Kellogg & Rose for services rendered the Illinois Surety Company while it was a going concern have unpaid bills that aggregate $1,650.00 for legal services and for disbursements $234.16, making a total of $1,884.16.

Your petitioner states that he is familiar with the litigation represented in said bill and that the charges that are made are in his opinion reasonable charges and that the services were actually rendered as set forth in said bill, and the same was filed with your petitioner as receiver on the 5th day of July, 1917, as Claim No. 934 and duly allowed by this Court.

He further states that since his appointment as receiver he continued said firm in the cases that were pending in the Courts in the City of New York, in which they had previously appeared as attorneys for the Illinois Surety Company, at the time that said Illinois Surety Company went into the hands of a receiver, and that for the services that have been rendered since your petitioner was appointed receiver Messrs. Kellogg & Rose have charges on their books aggregating the sum of $3,981.91 for services and this includes $221.76 moneys expended in and about the services rendered.

Your petitioner further states that these services rendered in cases since he has been the receiver of the Illinois Surety Company are of the same general character as those rendered the Illinois Surety Company when it was a going concern, and that the charges made by said firm of Kellogg & Rose are of the same general character as to the amount of services charged for, and that in his opinion they are reasonable charges.

He further states that within the last few months the senior member of said firm of Kellogg & Rose has departed this life, and
154 the members of the firm are reorganizing a new firm, and are desirous of clearing up the accounts that are due to the firm of Kellogg & Rose and that Mr. Rose has been to Chicago to consult your petitioner with reference to receiving pay for what is due the firm, both on the account that has been allowed and the unliquidated charges above set forth, and that in order to secure a prompt settlement he has offered to make a very substantial and very liberal discount of their account. In other words, he has agreed that if your petitioner will give to the firm $221.76 cash that the firm will accept in full settlement for the claim of $1,884.16 that is already allowed

by this Court and the claim that the firm have charged on their books against the receiver of $3,981.91 three Liberty Bonds of $1,000.00 each making a total of $3,221.76.

Your petitioner states that he has gone over these matters carefully with his counsel who have represented him before your Honor and before the Master, and is advised that the proposed settlement as above outlined is one that will be very beneficial to the creditors of the Illinois Surety Company.

Your petitioner, therefore, asks your Honor to enter an order, directing him to settle with the late firm of Kellogg & Rose by paying them three Liberty Bonds of $1,000.00 each and cash in the sum of $221.76 in full settlement of the above accounts.

JAMES S. HOPKINS,
Receiver of the Illinois Surety Company.

STATE OF ILLINOIS,
County of Cook, ss:

James S. Hopkins, being first duly sworn, deposes and says that he has read the foregoing petition and knows the contents
155 thereof and that the same is true in substance and in fact.

JAMES S. HOPKINS.

Subscribed and sworn to before me this 29th day of May, A. D. 1919.

[SEAL.]

GEO. O. FOY,
Notary Public, Cook County, Ill.

Filed Jun. 2, 1919.
JOHN KJELLANDER,
Clerk,
Per O.

Registered Jun. 2, 1919.
JOHN KJELLANDER,
Clerk,
Per O. S.

(Duly exemplified.)

PLAINTIFF'S EXHIBIT 6E.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Pleas, before the Honorable Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the second day of June, in the year of our Lord one thousand nine

hundred and nineteen, and of the Independence of the United States of America, the one hundred and forty-third.

156 Present:

The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook County.
Maclay Hoyne, State's Attorney.
Charles W. Peters, Sheriff of Cook County.

Attest:
JOHN KJELLANDER,
Clerk.

Be it remembered that heretofore, to wit: on the 2nd day of June, in the year of our Lord one thousand nine hundred and nineteen, the same being one of the days of the June Term of the Superior Court of Cook County, the following among other proceedings were had in said Court and entered of record, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

In re Petition to Settle the Claim of Messrs. Kellogg & Rose.

Order.

The petition of James S. Hopkins, receiver of the Illinois Surety Company, praying for authority to compromise and settle the claim of Messrs. Kellogg & Rose, attorneys at law, who have represented him as a receiver, and who prior to the appointment of a receiver for the Illinois Surety Company represented that company in various
157 lawsuits in the City of New York, and the Court being fully advised in the premises, and also being advised that all parties who are entitled to notice of this application on the part of the receiver have received due notice of the same and a copy of his petition, the Court doth find that it will be to the interest of the creditors of the Illinois Surety Company to effect a compromise and settlement as proposed in said petition.

It is, therefore, ordered, adjudged and decreed, that the receiver be and he is hereby authorized to pay to said firm of Kellogg & Rose the sum of $221.76 in cash and deliver to them three Liberty bonds of the sum of $1,000.00 each in full settlement for the claims and

demands of said firm against the Illinois Surety Company and against the receiver as set forth in said petition.

Enter,

DENNIS E. SULLIVAN,
Judge.

Filed Jun. 2, 1919.
JOHN KJELLANDER,
Clerk,
Per O.

(Duly exemplified.)

158 PLAINTIFF'S EXHIBIT 7.

September 23, 1918. E.

Messrs. Kellogg & Rose,
115 Broadway,
New York City.

Attention of Mr. Kellogg.

GENTLEMEN:

Mackey vs. Illinois Surety Co.

We have not heard from you in reference to the proposed stipulation appointing a new Referee and submitting the present record to him. Will you please to advise us as to your conclusion.

Yours very truly,

——— ———.

September 25th, 1918.

Messrs. Wilder, Ewen & Patterson,
45 Cedar Street,
New York City.

DEAR SIRS:

Mackey v. Illinois Surety Company.

In answer to your letter of September 23rd regarding the appointment of a referee in the above-entitled action, I would say that my client is unwilling to offer the present record to a new referee.

I think you had better make a motion for a new appointment at the same time submitting some names, if you so desire, upon which we might agree.

Yours very truly,

KELLOGG & ROSE.

L. L. K./R.

159 December 26, 1918. E.

Messrs. Kellogg & Rose,
115 Broadway,
New York City.

GENTLEMEN:

Mackey vs. Illinois Surety Co.

We wish to have a new Referee appointed in these two actions. Some while ago it was suggested that we name some Referees who would be satisfactory to use, and if possible you would approve of one of them.

Mr. Mackey has suggested the name of Mr. Robert J. Mahon as a lawyer who is known to your Mr. Kellogg, and who we understand has no relations with either party or attorney, which would interfere with his acting as Referee. If Mr. Mahon would be satisfactory to you, please let us know and we shall draw a stipulation, or shall be glad to submit some other name.

It was with deepest regret, that we heard of the death of the Senior member of your firm.

Yours very truly,

WILDER, EWEN & PATTERSON.

160 December 27th, 1918.

Messrs. Wilder, Ewen & Patterson,
45 Cedar Street,
New York City.

DEAR SIRS:

Mackey v. Illinois Surety Co.

Your letter of the 26th inst. received.

Owing to the death of the senor member of our firm, we cannot answer your letter until we have communicated with our client in regard to the matter. This we will do at once and let you know as soon as possible what course we can or may take in the matter.

Yours very truly,

KELLOGG & ROSE,
By ABRAM J. ROSE.

A. J. R./R.

January 28, 1919. W. R. W.

Messrs. Kellogg & Rose,
115 Broadway,
City.

DEAR SIRS:

Mackey vs. Illinois Surety Co.

Referring to our letter of December 26th and the response thereto of your Mr. Rose, we reluctantly call your attention to the fact that more than a month has elapsed since we suggested that a new Ref-

eree be appointed in the place of the late Mr. Larremore, and that the two actions entitled as above, proceed to judgment.

161 We realize the trouble and confusion caused by the death of the senior member of your firm, and are more than willing to make every allowance for that deplorable fact. We understand, however, that the delay is now due to your failure to communicate with the Receiver. We must insist that you get into touch with your client at the earliest possible moment and let us hear from you.

Very truly yours,

WILDER, EWEN & PATTERSON.

January 29th, 1919.

Messrs. Wilder, Ewen & Patterson,
45 Cedar Street,
New York City.

DEAR SIRS:

Mackey vs. Illinois Surety Co.

I have yours of the 28th inst. and am writing to the Receiver of the defendant, calling his attention to the same, and requesting instruction.

Yours very truly,

ABRAM J. ROSE.

A. J. R./R.

162 February 5th, 1919.

Messrs. Wilder, Ewen & Patterson,
45 Cedar Street,
New York City.

GENTLEMEN:

Mackey v. Illinois Surety Co., Actions 1 and 2.

Referring to the letters of your Mr. Wilder in the above cases, we would say that we have had an interview with our client, and are instructed to say to you that our client will not stipulate any of the testimony heretofore taken before the referee, now deceased, in a new reference.

Of course, you could get a reference by a motion which we do not desire to put you to the trouble of.

If you will submit to us in writing the names of five men who would be satisfactory to you, we will, as soon as possible, let you know whether we can agree to them, or, in turn, we will submit names to you.

Yours very truly,

KELLOGG & ROSE.

A. J. R./R

163 February 26, 1919. E.

Messrs. Kellogg & Rose,
115 Broadway,
New York City.

GENTLEMEN:

Mackey vs. Illinois Surety Co.

In accordance with your suggestion, we are proposing the names of the following lawyers as proposed referee in these actions:
Robert J. Mahon, #155 Nasau Street
George W. Field, #120 Broadway.
Schuyler E. Day, #48 Wall Street.
Robert Kelly Prentice, #52 Broadway.
George E. Coney, #31 Nassau Street.
Yours very truly,

——— ———.

Messrs. Kellogg & Rose, March 19, 1919. E.
#115 Broadway,
New York City.

GENTLEMEN:

Mackey vs. Illinois Surety Co.

Will you please to advise us as to your decision in reference to the names of Referees submitted to you in our letter? If none of these are acceptable, let us have the names of Referees who might be acceptable to you. If you do not wish to agree on the Referee let us know, in order that we may apply to the Court for appointment of new Referees.
Yours very truly,

WILLIAH M. PATTERSON.

164

Wilder, Ewen & Patterson, Esqs., March 20, 1919.
45 Cedar Street,
New York City.

GENTLEMEN:

In re Mackey vs. Illinois Surety Co.

I have your letter of the 19th instant.
I expected to have an interview with the Receiver before this time as he thought he would be in New York. I have written him asking him to wire me when he will be here so that I can talk with him about this matter. I will hear from him in a short time and will then communicate with you.
Yours very truly,

ABRAM J. ROSE.

A. J. R.: D

165 DEFENDANT'S EXHIBIT A.

Supreme Court of the State of New York, County of Kings.

Action No. 1.

DAVID CLINTON MACKEY, Plaintiff,

vs.

ILLINOIS SURETY COMPANY, Defendant.

Action No. 2.

DAVID CLINTON MACKEY, Plaintiff,

vs.

ILLINOIS SURETY COMPANY, Defendant.

To David Clinton Mackey, plaintiff:

You are hereby again notified as you have heretofore been notified that on the 30th day of January, A. D., 1918, Judge Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, State of Illinois, the Judge who has in charge the Estate of the Illinois Surety Company, entered an order, a copy of which is hereto attached marked "Exhibit A" and made a part of this notice.

You are further notified that on the 18th day of April, 1919, said Judge Denis E. Sullivan issued an order, a copy of which is attached and marked "Exhibit B" and made a part of this notice.

You are further notified that the office of Sidney S. Pollack, Master in Chancery, is Room 726 First National Bank Building, Chicago, Illinois.

JAMES S. HOPKINS.
Receiver of the Illinois Surety Company.

166 STATE OF NEW YORK,
County of Kings, ss:

—— ——, being first duly sworn, deposes and says that he served the foregoing notice on David Clinton Mackey on this — day of April, 1919, by leaving a true copy of the same with him.

—— ——.

Subscribed and sworn to before me this — day of April, A. D., 1919.

——, *Notary Public.*

Annexed to Defendant's Exhibit A was an order made in the action of Evans, et al., against Illinois Surety Company, dated January 30, 1918, which was marked "Exhibit A." It is printed in full hereafter as Defendant's Exhibit B6.

Also an order dated April 19, 1919, in said action, which was marked "Exhibit B." It is printed in full hereafter as Defendant's Exhibit B7.

167 DEFENDANT'S EXHIBIT B1.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County, Illinois.

H. H. EVANS et al.

vs.

ILLINOIS SURETY CO.

Bill and Petition for Dissolution and Receivership.

To the Honorable Judges of the said Superior Court of Cook County, Illinois, in Chancery Sitting:

Your petitioners, H. H. Evans, A. J. Hopkins, Charles E. Schick, James S. Hopkins, W. S. Beaupre, John C. Fetzer, William Coffenn, W. E. Gillette, E. S. Hobbs, Frank S. Whitman, Wm. Grote, et al., respectfully petition your Honors, as follows:

The Illinois Surety Company, of Chicago, Illinois, was incorporated April 13, 1905, under the laws of the State of Illinois, with a capital stock of Two hundred and fifty thousand ($250,000.00) dollars, and a paid in surplus of Fifty thousand ($50,000.00) dollars. On December 30, 1912, the capital stock of the company was increased two hundred and fifty thousand ($250,000.00) dollars, and fifty thousand ($50,000.00) dollars, paid into the surplus, making a total capital stock of Five hundred thousand ($500,000.00) dollars and a total paid in surplus of One hundred thousand ($100,000.00) dollars. That its capital stock, as thus increased, was divided into five thousand shares of the par value of one hundred ($100.00) each.

168 Your petitioners further show unto your Honors that on the 20th day of July, 1914, at a meeting at which four thousand and three shares of the total of the five thousand shares of the capital stock were represented, a resolution was presented and unanimously approved to reduce the par value of each share of stock from one hundred ($100.00) dollars per share to fifty ($50.00) dollars per share, and to reduce the capital stock from five hundred thousand ($500,000.00) dollars, to two hundred and fifty thousand ($250,000.00) dollars, and to increase its surplus fund correspondingly, and that said reductions were made, as provided by the laws of the State of Illinois; and that said reductions of the capital stock and the reduction of the par value of the shares of stock, as above set forth, were approved by the insurance superintendent of the State of Illinois, and filed and approved by the Secretary of the State of

Illinois, as provided by law, so that from thence hitherto the capital stock of said company has been two hundred and fifty thousand ($250,000.00) dollars, and its shares of stock of the par value of fifty dollars each.

Your petitioners further state unto your Honors that they constitute a majority in number and interest of the stockholders of said company, and that they own more than one-half of the shares of the capital stock of said company; that they desire to close said company and to procure a decree of dissolution of the corporation, in the manner provided by law.

Your petitioners further show that said Illinois Surety Company has, since its organization, as above set forth been actively and largely engaged in carrying on the business of Fidelity and Surety Insurance; that in the prosecution of its said business it has prosecuted its business under proper license and authority from the several states and places as follows, to wit:

169

Alabama,
California,
Connecticut,
District of Columbia and
Canal Zone,
Florida,
Illinois,
Indiana,
Iowa,
Kansas,
Kentucky,
Maryland,
Michigan,
Minnesota,
Mississippi,
Missouri,
Nebraska,
New Hampshire,
New Jersey,
New York,
North Carolina,
North Dakota,
Ohio,
Oregon,
Pennsylvania,
Rhode Island,
South Carolina,
Tennessee,
Utah,
Virginia,
Washington,
Wisconsin.

170 Your petitioners further state and show unto your Honors that said Illinois Surety Company has on deposit with the in-

surance superintendent of the State of Illinois one hundred thousand ($100,000.00) dollars par value United States Government Consuls 2% 1930, and one hundred thousand ($100,000.00) dollars par value Sanitary District of Chicago Bonds 4% 1917, 1922 and 1923; that these deposits are held for the benefit of all policy holders in the United States.

Your petitioners further state unto your Honors that it has on deposit in the Panama Canal Zone, City of New York 4% 1956, ten thousand ($10,000.00) Dollars for the authority to enable it to do business in the Canal Zone; that said bonds are under the control primarily of the Internal Revenue Collector on the Canal Zone, and that that office is a part of the War Department of the Federal Government; that it has on deposit with the treasurer of the State of Virginia thirteen thousand ($13,000.00) dollars in bonds, City of Norfolk, 4% 1932, it has on deposit with the Treasurer of the State of Alabama fifty thousand ($50,000.00) Dollars in United States Government Consul- 2% 1930; that in April, 1913, it discontinued doing any business in Alabama and reinsured all of its live business in the state in the month of April, 1913, and that since then it has written no new business there and that said Government Consuls held by the treasurer of the State of Alabama are a part of its admitted assets the same as the deposits with the superintendent of the State of Illinois.

Your petitioners further state unto your Honors that said company has an order on the comptroller of the City of New York for
171 the sum of fifteen thousand ($15,000.00) dollars, which is due to said company from said comptroller and which should be paid to said company within a very brief period from this time.

Your petitioners further state unto your Honors that it has certain real estate in the State of New Jersey, and in the State of New York, and personal property also in the State of New York and has some property and assets in the City of Washington, District of Columbia, in the City of Detroit, State of Michigan, in the City of Milwaukee, State of Wisconsin and in the City of Seattle, State of Washington.

Your petitioners further state and show unto your Honors that in June, 1914, the La Salle Street Trust & Savings Bank of Chicago, Illinois, failed, and a receiver was appointed to take charge of its property and assets, and that said bank at said time, and from thence hitherto has been insolvent, and has been utterly unable to pay its depositors; that the Illinois Surety Company had bonds on said bank for the indemnity to the City of Chicago, the Federal Government and other parties in the aggregate of Two hundred and twenty-five thousand ($225,000.00) dollars; that on the failure of said bank the Illinois Surety Company was called upon by the several obligees in its said bonds to make good what otherwise would be a loss to said obligees by reason of the failure of said La Salle Street Trust & Savings Bank. Your petitioners state that it was by reason of this that the capital stock of said company was reduced from five hundred thousand ($500,000.00) dollars, as above set forth to two hundred and fifty thousand ($250,000.00) dollars, and the said company

through its officers, has been liquidating said liability on said bonds since said failure.

172 Your petitioners further state and show unto your Honors that prior to the 18th day of December, 1913, one D. C. Mackey of New York City was the agent of the Illinois Surety Company to solicit business in the City of New York and to execute fidelity and surety insurance bonds; that said Mackey turned out to be not only a reckless underwriter of Fidelity and surety bonds but that he was dishonest in this, that he wrote a large number of bonds without ever reporting them to the home office, upon a number of which there have been losses, and that these losses have had to be met during the years 1914 and 1915, and others of said losses will have to be met during the coming year if said company should continue in business.

Your petitioners further show unto your Honors that during the years 1914 and 1915 the Illinois Surety Company paid out on losses, including losses on the La Salle Street Trust & Savings Bank and subsidiary banks, and losses occasioned by reason of the misconduct of said Mackey, the sum of five hundred and eighty-three thousand nine hundred and twenty-four ($583,924.00) dollars, and that these payments do not represent all the losses that it has sustained and that it will ultimately have to pay by reason of the failure of the La Salle Street Trust & Savings Bank and the misconduct of said Mackey.

Your petitioners further state that the Illinois Surety Company has since its organization been actively and largely engaged in carrying on the business of Fidelity and surety insurance in the States heretofore named; that it has now outstanding on its books policies to the amount of approximately seventy two million ($72,000,000.00) Dollars.

173 Your petitioners further state and show unto your Honors that claims have been made on said Illinois Surety Company on business that it has written in the various states, and that are now pending and undetermined, including the writings of said Mackey and the losses on said bank, in the aggregate of more than one million ($1,000,000.00) dollars; that they cannot state at this time how many claims on the outstanding policies of approximately Seventy-two million ($72,000,000.00) Dollars, above mentioned, will be made on said company.

Your petitioners state that the total admitted assets of the Illinois Surety Company upon which it is licensed by the Federal Government and the various state governments to do business, aggregate the sum of six hundred and eighty four thousand ($684,000.00) dollars that it has other assets that are not admitted as assets by said State Government and the Federal Government upon which it can do business, in the total value of two hundred and fifty-six thousand ($256,000.00) dollars, your petitioners cannot state how much of this last sum can be realized in cash.

Your petitioners state that the surplus and capital of said Illinois Surety Company have not only become and are impaired, but that said company has become and is insolvent.

Your petitioners state that the property and assets of the Illinois Surety Co. are subject to attachment and garnishment proceedings at the hands of creditors of said corporation, and that said corporation will, if a receiver for it is not appointed be subjected to a multiplicity of complicated and extended suits and litigations in various states; that its renewal lists on its fidelity and other surety insurance, which are of value, may be copied or lost; that its assets will
171 be depleted and impaired, by attachments, garnishments, and other like legal proceedings, and that in such case not only will the said corporation and many of its creditors be subjected to much loss and expense but its net assets will be greatly depleted and your petitioners' claims injured thereby, and the assets of said corporation will be unevenly and inadequately distributed to its creditors.

Your petitioners therefore make the said Illinois Surety Company party defendant hereto, and pray this Honorable Court that the said Illinois Surety Company may be restrained by proper decree entered by your Honors from further prosecution of its business, and that after such decree has been entered by your Honors that a receiver be appointed forthwith, with all the usual powers and duties of receivers in equity, to take charge of the estate and effects of said corporation, including all such securities as are deposited in this and other states, to collect the debts due and the property belonging to said corporation with power to prosecute and defend suits in the name of said corporation, or in the name of said receiver, and to do all other acts necessary for the collection, marshalling, and distribution of the assets of said Illinois Surety Company and the closing of its concerns; that said Illinois Surety Company may be compelled to answer this bill and petition, but not under oath, answer under oath being waived and that upon a final hearing a decree may be entered herein dissolving the said Illinois Surety Company and providing for the distribution of its assets to its creditors, and whatever surplus may remain to be distributed to your petitioners and the other stockholders of said company in the proportion that their stock shall bear to the total amount of the capital stock of said company, and
175 that your petitioners may have such other and further relief as to this Honorable Court shall seem meet.

A. J. HOPKINS,
CHARLES SCHICK,
JAMES D. HOPKINS,
W. G. BEAUPRE,
JOHN C. FETZER,
WILLIAM COFFEEN,
H. H. EVANS,
W. E. GILLETTE,
E. S. HOBBS,
FRANK S. WHITMAN,
WM. GROTE,
CLARE S. ADDISON,
MAMIE S. BURDAU,
E. J. BUFFINGTON,

A. M. BEAUPRE,
W. W. CALHOUN,
LILLIAN CONSTANTINE,
E. W. CHANDLER,
U. S. COREY,
LOUIS A. CONSTANTINE,
GEORGE E. SUTTON,
W. L. ELLWOOD,
ESTATE OF I. L. ELLWOOD,
EDWIN C. FABER,
THOMAS FITZSIMMONS,
E. P. GARDNER,
GEO. F. GETZ,
GRACE THOMPSON,
GEO. HUNTER,
O. T. HULBURT,
JAMES A. BUCKMAN,
WM. HILL,
MRS. EMMA HOPKINS,
MRS. ELLA CARLISLE,
JOHN F. JELKA,
F. KINSINGER,
MABEL W. KUNZMANN,
THOMAS McDONALD,
FRED L. MANDEL,
ISABELLE MANDEL,
S. R. PIERCE,
MRS. SARAH I. PIERCE,
S. J. PEFFERS,
CHAS. I. PIERCE,
RYAN & CABLE, INC.,
CHAS. D. ROSENFIELD,
W. A. ROSENFIELD,
CALLIE SCOFIELD,
JAMES SHEAHAN,
T. B. STEWART,
PAULINE B. F. SMITH,
WM. WRIGLEY, JR.,
R. C. ELLIS,
JOHN W. WATERMAN,

By A. J. HOPKINS,
Their Agent.

STATE OF ILLINOIS,
County of Cook, ss:

I, Chas. E. Schick, being first duly sworn, depose and say that I am one of the above named petitioners; that I have read the
176 above and foregoing petition and know the contents thereof, and that the same is true in substance and in fact, as therein set forth.

CHAS. E. SCHICK.

Subscribed and sworn to before me this — day of April, A. D. 1916.

[Notarial Seal.] GEO. O. FOY,
Notary Public.

A. J. HOPKINS,
Solicitors for Petitioners.

Filed Apr. 19, 4-51 P. M., 1916.

RICHARD J. McGRATH,
Clerk,

Per R.

STATE OF ILLINOIS,
County of Cook, ss:

I, John Kjellander, Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain Bill and Petition for Dissolution and Receivership filed in my office April 19, 1916, in a certain cause now pending in said Court on the Chancery side thereof, wherein H. H. Evans, et al., are complainants and Illinois Surety Company is defendant.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Chicago, this 4th day of February, A. D. 1920.

[SEAL.] JOHN KJELLANDER,
Clerk.

177 UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

I, Theodore Brentano, Chief Justice of the Superior Court of Cook County, in and for said county, do hereby certify that John Kjellander whose name is subscribed to the foregoing Certificate of attestation, now is, and was, at the time of signing and sealing the same, the Clerk of said Superior Court of Cook County, and keeper of the seal and records thereof, duly elected, commissioned and qualified to office; that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that his attestation is in due form of law and by the proper officer.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Chicago, in said county, this 4th day of February, 1920.

THEODORE BRENTANO,
[SEAL.] *Chief Justice of the Superior Court, Cook County.*

178 UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

I, John Kjellander, Clerk of the Superior Court of Cook County, in and for said County, do hereby certify that Theodore Brentano, whose name is subscribed to the foregoing certificate of attestation, now is, and was, at the time of signing and sealing the same, the Chief Justice of said Superior Court of Cook County, and was duly elected, commissioned and qualified to office; that full faith and credit are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that his attestation is in due form of law and by the proper officer.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Chicago, in said County, this 4th day of February, 1920.

JOHN KJELLANDER,
Clerk.

[SEAL.]

Each of the following papers marked Defendant's Exhibits B2 to 7, inclusive each of those heretofore printed and marked Plaintiff's Exhibit 6A to E, inclusive, had attached thereto a certificate and exemplification in the same form as that attached to Defendant's Exhibit B1.

Printing in full in each instance is dispensed with.

179 DEFENDANT'S EXHIBIT B2.

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County, Illinois.

H. H. EVANS et al.

v.

ILLINOIS SURETY COMPANY.

Answer of the Illinois Surety Company to the Bill for Dissolution of the Illinois Surety Company as a Corporation and a Receivership.

And now comes the Illinois Surety Company, by its solicitor, H. C. Davis, and waives the service of a notice in the above case on the defendant, and also waives the issuance of a summons and enters its appearance herein, and submits to the jurisdiction of this court

in said cause, and for answer to the same states that the statement and averments in said petition are true.

ILLINOIS SURETY COMPANY,
By H. C. DAVIS,
Its Solicitor.

H. C. DAVIS,
Its Solicitor.

321,884. Filed Apr. 19, 4-51 P. M., 1916.
RICHARD J. McGRATH,
Clerk,
Per R.

(Duly Exemplified.)

180 DEFENDANT'S EXHIBIT B3.

Placita.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County.

Pleas, before the Honorable Charles M. Foell, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County, and State, on the first Monday, being the third day of April, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America, the one hundred and fortieth.

Present:

The Honorable Charles M. Foell, Judge of the Superior Court of Cook County.
McClay Hoyne, State's Attorney.
John E. Traeger, Sheriff of Cook County.

Attest:
RICHARD J. McGRATH,
Clerk.

Be it remembered that heretofore, to wit, on the 19th day of April, in the year of our Lord one thousand nine hundred and sixteen the same being one of the days of the April Term of the Superior Court of Cook County the following among other proceedings were had in said Court and entered of record, to wit:

181 #321,844.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Bill.

This cause coming on this day to be heard upon the sworn bill and petition this day filed herein, and the answer thereunto of the defendant the Illinois Surety Company, admitting that all the material allegations and averments in said bill and petition are true, the petitioners appearing by A. J. Hopkins, their solicitor, and the defendant, the Illinois Surety Company, appearing by H. C. Davis, its solicitor, and the Court being fully advised in the premises, doth find from said bill and petition and answer and oral proof heard in open court that the averments in said bill and petition are true, and doth order, adjudge and decree as follows, without bond from the complainants and until the further order of Court.

1. That the said Illinois Surety Company be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business.

2. That all the servants, agents, officers and employees of said Illinois Surety Company, be and they are hereby restrained and enjoined from interfering with, copying or carrying away any of its books, papers, records, schedules, lists of policyholders, or other documents, or any copies thereof.

Enter,

CHARLES M. FOELL,
Judge.

182 DEFENDANT'S EXHIBIT B4.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Pleas, before the Honorable Charles M. Foell, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said county and state, on the first Monday, being the third day of April, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States, the one hundred and fortieth.

Present:

The Honorable Charles M. Foell, Judge of the Superior Court of Cook County.
McClay Hoyne, State's Attorney, John E. Traeger, sheriff of Cook County.

Attest:
RICHARD J. McGRATH,
Clerk.

Be it remembered that heretofore, to wit, on the 19th day of April in the year of our Lord one thousand nine hundred and sixteen the same being one of the days of the April Term of the Superior Court of Cook County the following among other proceedings were had in said court and entered of record, to wit:

183 April 19, 1916.

#321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Bill.

This cause again coming on to be heard for the appointment of a receiver on the sworn bill and petition filed herein since the entering of the order restraining and enjoining and forbidding said Illinois Surety Company from further prosecution of its business, and oral proof offered in support of the averments of said bill and petition, and the answer thereunto of the defendant, the Illinois Surety Company, admitting that all the material allegations and averments of said bill and petition are true, and the petitioners appearing by A. J. Hopkins, their solicitor, and the defendant, the Illinois Surety Company, appearing by H. C. Davis, its solicitor, and the Court being fully advised in the premises, doth order, adjudge and decree that James S. Hopkins, of Chicago, Illinois, be, and he is, hereby constituted and appointed receiver of the said Illinois Surety Company, and of all and singular the real estate, personalty, choses in action, bonds, bills, notes, securities, evidence of indebtedness, books, records, moneys, checks, drafts and other property and assets of every nature, real and personal, of and belonging to the said Illinois Surety Company or in any manner held in trust for, or subject to the control of said defendant, including such securities as may be deposited with the Superintendent of Insurance of the State of Illinois, with the Treasurer of the State of Alabama, with the Internal Revenue Collector in Panama of the Isthmian Canal Zone, or with the
184 Commissioner of Insurance or Treasurer of the State of Virginia, with power to take possession of all such assets of every

name and nature whatsoever, real and personal, and to institute any and all necessary proceedings or actions to recover the same, either at law or in equity, with power to prosecute and defend suits in the name of the Illinois Surety Company, or in his own name, to appoint agents under him, and an attorney or attorneys to prosecute and defend suits and perform all other service necessary for the successful carrying out of said receivership, and to appoint agents under him and to do all other acts necessary for the collection, marshalling and distributing of the assets of the said Illinois Surety Company, and the closing of its concerns.

2. That the said James S. Hopkins, as Receiver as aforesaid, give bond for the faithful performance of his duty as such receiver, in the penal sum of two hundred thousand ($200,000) dollars and with a surety or sureties to be approved by this Court.

3. That the said Receiver shall, and he is hereby given leave to apply to this Court for such further orders and directions as equity and justice and the rules of this court require in relation to and concerning the collection, marshalling and distributing of the assets of said Illinois Surety Company, and the closing of its concerns, for all which purposes jurisdiction is hereby expressly retained until final hearing and settlement thereafter of all unfinished business of said Illinois Surety Company, and the receivership herein.

4. The said receiver shall have all the usual powers and duties of Receivers in Chancery. On due notice to said defendant Illinois Surety Company, and on full hearing, good cause being shown, said complainants are hereby excused from giving a bond as a condition to the appointment of a Receiver herein.

(Duly exemplified.)

185 DEFENDANT'S EXHIBIT B5.

Placita.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County.

Pleas, before the Honorable Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said county and state, on the first Monday, being the seventh day of January, in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States of America, the one hundred and forty-second.

Present:

The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook Co.
Maclay Hoyne, State's Attorney.
John E. Traeger, Sheriff of Cook County.

Attest:
JOHN KJELLANDER,
Clerk.

Be it remembered that heretofore, to wit: on the 30th day of January, in the year of our Lord one thousand nine hundred and eighteen the same being one of the days of the January Term of the Superior Court of Cook County the following among other proceedings were had in said court and entered of record, to wit:

186 No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Bill.

This cause coming on this day to be heard upon motion of James S. Hopkins, as receiver of Illinois Surety Company, to approve his several reports filed on July 13, 1916, January 20, 1917, and January 15, 1918, respectively, and upon due notice to all parties entitled to receive notice thereof.

It is ordered, that all claimants, creditors and parties in interest be, and they are, hereby ruled to file their objections if any, to said several reports with the clerk of this court, in writing, within ten days, and that in case no such objections be filed, the said several reports in all respects stand approved and confirmed by the Court, except as to the matters hereinafter mentioned.

It is further ordered that all claims listed in exhibit "A" of said Receiver's report of January 15, 1918, which said Receiver has therein recommended for allowance (excepting those to which objections may be filed as hereinbefore provided), be and the same are hereby allowed and the Receiver is ordered and directed to pay the same in due course of administration.

It is further ordered that all other claims filed with the receiver, or with the clerk of this court, which the Receiver has not so recommended for allowance, including all claims listed in Schedules B, D, E and F of said Receiver's report of January 15, 1918, and those claims listed in Exhibit A, to which objections may be filed, as above provided, be, and they are hereby referred to Master
187 in Chancery, Sidney S. Pollack, whose office is 726 First National Bank Building, Chicago, Illinois, to hear and take

the evidence thereon, and to report the same, together with his conclusions of law and fact thereon, to the Court within sixty days, within which said time all claimants and parties are hereby ruled to adduce their evidence before said Master upon said claim so referred to said Master for hearing.

It is further ordered that a copy of this order be sent by the Receiver to each of the said claimants and creditors or their attorneys through the United States mails within ten days from the date hereof.

Enter,

DENIS E. SULLIVAN,
Judge.

DEFENDANT'S EXHIBIT B6.

Placita.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County.

Pleas, before the Honorable Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said county and state, on the first Monday, being the seventh day of January, in the year of our Lord one
188 thousand nine hundred and eighteen, and of the independence of the United States of America, the one hundred and forty-second.

Present:

The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook County.
Maclay Hoyne, State's Attorney.
John E. Traeger, Sheriff of Cook County.

Attest:
JOHN KJELLANDER,
Clerk.

Be it remembered that heretofore, to wit: on the 30th day of January, in the year of our Lord one thousand nine hundred and eighteen the same being one of the days of the January Term of the Superior Court of Cook County the following among other proceedings were had in said court and entered of record, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Order.

Whereas, the report of James S. Hopkins, as Receiver of the Illinois Surety Company filed in this court on January 15,
189 1918, discloses the fact that there is a large number of cases pending against the Illinois Surety Company in the various courts of the different States in which the Illinois Surety Company did business while it was a going concern, and that in a number of these cases the Receiver of this Court, James S. Hopkins, has been made party defendant by said claimants with the said Illinois Surety Company without the authority of this Court, and that said suits are now all undetermined in said courts, and,

Whereas, this Court did on the 30th day of January, 1918, enter an order that all claims against the Illinois Surety Company including all such claims as are pending against the Illinois Surety Company in the various courts of the different States, and such suits as are pending against the Illinois Surety Company and the Receiver of this court jointly, were referred to Sidney S. Pollack, Master in Chancery of this court, to hear and determine on proper evidence adduced by such claimants, and report his conclusions of law and fact under the evidence taken by him in all of said matters to this Court within sixty (60) days from the date of said order.

Now therefore, the said Receiver, James S. Hopkins is hereby directed to discontinue any expense in defense of any of such suits so pending that have been commenced against the Illinois Surety Company and against the Illinois Surety Company and him as Receiver of said Illinois Surety Company in any of the courts in any of the states in which said company was doing business while it was a going concern, and is not authorized to employ attorneys or pay any expenses from this date in defense of any of such suits and said Receiver is hereby directed to notify all such claimants or their attorneys of this order by sending to such claimants or their
190 attorneys through the United States mails to their last known place of business or residence a printed copy of this order.

It is further ordered and directed that all claimants in any of said suits referred to in this order who fail or neglect to file their claims with Sidney S. Pollack, Master in Chancery of this court, within the time limited in said order and duly prosecute the same in ac-

cordance with the terms of said order shall be barred from participating in any dividends derived from the property and assets of the Illinois Surety Company now in the possession and control of this Court through its said Receiver James S. Hopkins.

Dated this 30th day of January, A. D., 1918.

Enter,

DENIS E. SULLIVAN,
Judge.

(Duly exemplified.)

DEFENDANT'S EXHIBIT B7.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
County of Cook, ss:

Pleas, before the Honorable Denis E. Sullivan, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch court of said court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said county, and state, on the first Monday, being the seventh day of April, in the year of our Lord one thousand nine hundred and nineteen, and of the independence of the United States of America, the one hundred and forty-third.

191 Present:

The Honorable Denis E. Sullivan, Judge of the Superior Court of Cook County.
Maclay Hoyne, State's Attorney.
John E. Traeger, Sheriff of Cook County.

Attest:
JOHN KJELLANDER,
Clerk.

Be it remembered that heretofore, to wit: on the 18th day of April,, in the year of our Lord one thousand nine hundred and nineteen the same being one of the days of the April Term of the Superior Court of Cook County, the following among other proceedings were had in said court and entered of record, to wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

No. 321,884.

H. H. EVANS et al.

vs.

ILLINOIS SURETY COMPANY.

Order.

The petition of James S. Hopkins, Receiver of the Illinois Surety Company coming on to be heard, and it appearing to the Court that all persons who are entitled to receive notice of said petition
192 and application to this Court, as provided in said petition have been duly notified, and it appearing to the Court that the interests of the creditors of the Illinois Surety Company will be best subserved by directing the Receiver to take no further action relating to either of the cases mentioned and to require said Mackey to file his claims before Sidney S. Pollack, Master in Chancery of this court like all other claimants are required to file under the order of this Court under date of January 30, 1918, if he desires to participate in the assets of said Illinois Surety Company.

Now, therefore, the said Receiver, James S. Hopkins, is hereby directed to discontinue any further defense in either of said cases wherein said David Clinton Mackey is plaintiff and the Illinois Surety Company is defendant, now pending in the Supreme Court of Kings County, State of New York, and he is hereby directed to notify said Mackey of the said order of this Court of January 30, 1918, and of this order either by a letter through the United States mails or by a notice personally served upon said Mackey.

The said order of January 30, 1918, is hereby modified as respects the said two cases by allowing said Mackey sixty (60) days from the date of this order to file before said Master in Chancery, Sidney S. Pollack, any claim or claims that he has against the Illinois Surety Company that are represented in said suits or either of them.

Dated this 18th day of April, 1919.

Enter,

DENIS E. SULLIVAN,
Judge.

(Duly exemplified.)

193 The foregoing constitutes all of the testimony and statements of all of the evidence introduced and offered upon the trial of this cause.

And in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his bill of exceptions of this case,

and prays that the same may be settled and allowed, signed and certified by the Judge, as provided by law.

Dated May 8, 1920.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

Stipulation Settling Case.

It is hereby stipulated and consented that the foregoing bill of exceptions be settled and allowed and be ordered filed as the bill of exceptions herein.

Dated June 3, 1920.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

GLEASON, VOGEL & PROSKAUER,
Attorneys for Defendant.

Order Settling Case.

Upon the foregoing stipulation, it is hereby

Ordered, that the foregoing bill of exceptions be and the same hereby is settled and allowed and that the same be filed.

Dated June 10th, 1920.

EDWARD E. CUSHMAN,
District Judge.

194 *Assignments of Error.*

In the District Court of the United States for the Southern District of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

The plaintiff in this action in connection with this petition for a writ of error, makes the following assignments of errors which he avers occurred upon the trial of the case, to wit:

1. That the Court erred in admitting in evidence the notice addressed to David Clinton Mackey, signed "James S. Hopkins" of the making of certain orders attached to the said notice, and which notice and the papers annexed is marked Defendant's Exhibit A.

2. That the Court erred in admitting in evidence an exemplified copy of a petition and bill in equity in an action in the Superior Court of Cook County, Illinois, entitled "Evans against Illinois Surety Company," for a dissolution and receivership, which was marked Defendant's Exhibit B1,

3. That the Court erred in admitting in evidence an exemplified copy of an answer of the defendant in the said action of Evans against Illinois Surety Company. Also in admitting an exemplified copy of an order in the said action, dated April 19, 1916, attempting

to restrain the defendant from doing business, which said answer and order were marked Defendant's Exhibits B2 and B3.

195 4. That the Court erred in admitting in evidence an exemplified copy of an order in the action of Evans against Illinois Surety Company, dated April 19, 1916, appointing a Receiver, which said order was marked Defendant's Exhibit B4.

5. That the Court erred in admitting in evidence an exemplified copy of an order in the said action of Evans against Illinois Surety Company, dated January 30, 1918, which said order purports to direct the filing of claims against the defendant, which is marked Defendant's Exhibit B5.

6. That the Court erred in admitting in evidence an exemplified copy of an order in said action of Evans against Illinois Surety Company, dated January 30, 1918, which said order directs the receiver to discontinue defending certain actions, the said order being marked Defendant's Exhibit B6.

7. That the Court erred in receiving in evidence an exemplified copy of an order in the said action of Evans against Illinois Surety Company, dated April 18, 1919, directing the Receiver to discontinue further defense in certain actions, in which David Clinton Mackey was plaintiff and the Illinois Surety Company was defendant, the said order being Marked Defendant's Exhibit B7.

8. That the Court erred in denying the plaintiff's motion for a direction of a verdict in favor of the plaintiff at the conclusion of the case.

9. That the Court erred in granting the defendant's motion for a direction of a verdict in its favor and erred in directing the jury to find a verdict in favor of the defendant.

10. That the Court erred in denying the plaintiff's motion to set aside the verdict for a new trial.

196 11. That the Court erred in entering judgment in favor of the defendant and against the plaintiff on the merits and directing that the defendant recover of the said plaintiff the sum of Sixty-eight 60/100 dollars ($68.60) costs, and that it have execution therefor.

Wherefore, the said plaintiff prays that the judgment of the District Court for the Southern District of New York be reversed, and that the said District Court be directed to grant a new trial of said case, or that the said District Court be directed to enter judgment in favor of the plaintiff and against the defendant for the relief demanded in the complaint.

Dated, June 16, 1920.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

45 Cedar Street, Borough of Manhattan, City of New York.

Petition for Writ of Error.

In the District Court of the United States for the Southern District of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

Now comes John Ewen, the plaintiff herein and says that on or about the 29th day of March, 1920, this Court entered a
197 judgment herein in favor of the defendant and against the plaintiff, and in which judgment and proceedings or prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the plaintiff prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of errors complained of, and that a transcript of the record and proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated, New York, June 16, 1920.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.

45 Cedar Street, Borough of Manhattan, City of New York.

Writ allowed.
6/23/20.

J. M. MAYER,
U. S. D. J.

198 *Cost and Supersedeas Bond on Appeal.*

Supersedeas and cost bond in usual form, duly filed and allowed on the granting of the writ of error. Its printing in full is omitted by consent.

Citation.

By the Honorable Julius M. Mayer, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit to American Fidelity Company, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York,

in the District and Circuit above named, on the 22nd day of July, 1920, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein John Ewen is plaintiff-in-error, and you are defendant-in-error to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 23rd day of June, in the year of our Lord One thousand nine hundred and twenty, and the Independence of the United States the One hundred and forty-fourth.

J. M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

199 *Stipulation.*

United States District Court for the Southern District of New York.

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

Dated, July 22, 1920.

WILDER, EWEN & PATTERSON,
Attorneys for Plaintiff.
GLEASON, VOGEL & PROSKAUER,
Attorneys for Defendant.

200 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

JOHN EWEN, Plaintiff,

against

AMERICAN FIDELITY COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties and as settled by the Court.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 21st day of August, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk.

201 United States Circuit Court of Appeals for the Second Circuit, October Term, 1920.

No. 116.

JOHN EWEN, Plaintiff-in-Error,

v.

AMERICA FIDELITY COMPANY, Defendant-in-Error.

Argued December 17, 1920. Decided March 2, 1921.

In Error to the District Court of the United States for the Southern District of New York.

Before Rogers, Hough, and Manton, Circuit Judges.

Wilder, Ewen & Patterson, Attorneys for Plaintiff-in-Error.
John Ewen, William R. Wilder, Of Counsel.
Gleason, Vogel & Proskauer, Attorneys for Defendant-in-Error.
Joseph M. Proskauer, Wesley S. Sawyer, Of Counsel.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

On May 11, 1915, a summons was issued in an action brought in the New York Supreme Court, Kings County, wherein David Clinton Mackey was plaintiff and the Illinois Surety Company was defendant.

That company was a surety corporation organized under the
202 laws of the State of Illinois. Mackey had been its agent in New York City for the purpose of executing fidelity and surety bonds. The action was brought by him to recover an alleged balance of commissions due under contracts respecting which Mackey acted as agent and broker for the Company, obtaining the applications for the bonds and issuing the same.

In the above action Mackey in his complaint declared that he had at the special instance of the Surety Company performed services for it in the procuring and execution of surety company bonds and undertakings and that the company had agreed to pay him therefor certain commissions on all premiums earned in respect to such bonds and undertakings. He asked for judgment in the aggregate sum of $7,498.02 with interest from February 20, 1915. By stipulation and consent and pursuant to an order of the court an amended com-

plaint was subsequently filed on November 28, 1917, in which Mackey demanded judgment in the sum of $23,000.

The Surety Company in its answer admitted some of the allegations in the complaint and denied others. It set up the contract which existed between it and Mackey and alleged that after Mackey had repeatedly violated its provision he was on that account discharged by it on December 17, 1913. It set up by way of counterclaim that Mackey had collected premiums for which he was liable to the defendant in the sum of $495,269.72, on which the commissions earned amounted to $185,614.47 leaving a balance of $309,655.25 as its share of the said premiums. That of this amount it had received the sum of $245,700.99, leaving a balance due and owing to it the sum of $63,954.25. It was also alleged that Mackey as agent had collected other sums which he had converted to his own use wrongfully and it asked for judgment in its favor for the sum of $153,914.56 with interest from December 17, 1913.

The case was at issue in July 1915, and it was not until November 21, 1917, that Mackey obtained an order of reference. It was finally agreed that the matter should be submitted to the
203 referee in August, 1918. About that time the referee died.

The second referee was not appointed until May 2, 1919, which was 8 months after the first referee's death. The referee then appointed filed his report on June 9, 1919, in which he found the plaintiff entitled to judgment against the defendant in the sum of $31,859.38 with interest thereon from January 1, 1917, in the amount of $4,662.08, making a total of $36,521.46, and for the costs of the action to be taxed. The counterclaim set up in the answer was dismissed. Accordingly and on June 21, 1919, judgment was entered in favor of Mackey in the amount of $37,041.95.

It appears that prior to the entry of this judgment Mackey had attached certain property belonging to the Surety Company the warrant having been issued to the Sheriff of the County of Kings and a levy made thereunder. The property so attached was released on July 10, 1915, by the execution and delivery of a bond by the American Fidelity Company whereby it undertook in the sum of $7,500 that the Illinois Surety Company would on demand pay to Mackey any judgment he might obtain against it in the action then pending between them, not exceeding the amount above named. And thereupon the attachment was released.

On the same day that Mackey obtained his judgment he assigned it to John Ewen, a lawyer in the City of New York. The assignment gave to the assignee an irrevocable power of attorney to take all lawful ways to recover the money due on the judgment. And on the same day by a separate instrument Mackey also assigned to Ewen all of his rights against the American Fidelity Company growing out of its undertaking already referred to.

The assignee of the judgment on August 29, 1919, commenced the present action against the American Fidelity Company as defendant on the bond given by it to Mackey by which it undertook that the judgment which Mackey obtained against the Illinois Surety Com-

pany should be paid in a sum not exceeding $7,500 with interest.

204 The plaintiff in the present action alleges in his complaint the giving by the defendant of its undertaking to Mackey that the Illinois Surety Company would pay any judgment he obtained in his action against that Company in a sum not to exceed $7,500. It alleges the recovery of the judgment in the sum of $37,041.95, and that demand has been made for the payment of the judgment by the Illinois Surety Company and that no part thereof has been paid either by that Company or by the defendant. He demanded judgment against the defendant in the sum of $7,500.

The defendant thereupon removed the action from the state court into the District Court of the United States for the Southern District of New York on the ground of diversity of citizenship. It appears that the Illinois Surety Company was organized under the laws of the State of Illinois. It also appears that the American Fidelity Company, defendant herein, is a corporation organized under the laws of the State of Vermont and is licensed and authorized to transact fidelity and surety business in the State of New York, and that it was actually so transacting business therein at the times mentioned in the complaint.

After the removal into the District Court defendant answered and set up the defense that at the time judgment was entered in the action which Mackey brought against the Illinois Surety Company that corporation was not in existence and that the judgment was consequently void.

On the trial of the case in the court below by consent of counsel a jury of one was impaneled and sworn.

At the conclusion of the case counsel for the defense moved to dismiss and also moved to direct a verdict for defendant on the ground that at the time the alleged judgment was entered the Illinois Surety Company had ceased to exist and that it was impossible to enter a valid legal judgment against it thereafter. The court stated that the defense had been established, and he accordingly in-

205 structed the jury to return a verdict for the defendant. This was done and judgment was rendered accordingly.

ROGERS, *Circuit Judge* (after stating the above facts):

When a corporation has been legally dissolved it is dead. According to the principles of the common law it is not in existence for any purpose thereafter. The necessary effect of the death of a corporation is not different from the death of a natural person in that in the case of each no judgment can thereafter be entered against either in the absence of a statute otherwise providing. A judgment can no more be rendered against a dead corporation than against a dead man. It is wholly void in the one case as in the other. That such is the common law rule is so well established upon the authorities that it is idle to controvert it. An action against a corporation abates when corporate existence comes to an end. Pendleton v. Russel 144 U. S. 640; Garr v. Hamilton 129 U. S. 252; Martyne v. American Ins. Co., 216 N. Y. 196; Blanchard v. Gay Co., 289 Ill. 421; Thorn-

ton Railway Co., 123 Mass. 32; Morgan v. New York National Building Association 73 Conn. 151; Eagle Chair Co. v. Kelsey, 23 Kans. 632; Short Line R. R. Co. v. Maine Central R. R. Co. 92 Mo. 476.

It is necessary to inquire, therefore, into the alleged dissolution of the Illinois Surety Company to ascertain whether the corporation had become civiliter mortuus before judgment was rendered against it. It appears that the statute under which the Illinois Surety Company was organized is entitled "An act to provide for the organization, management and regulation of surety companies" in force April 17, 1899. That that statute provided that such companies shall be subject to the provisions of "An Act in regard to the dissolution of insurance companies" in force July 1, 1874. That this statute of 1874, (Hurds Rev. St. of Illinois, 1917, Part 2, Ch. 73, pp. 1679-80) provides as follows:

"3. That charters of all insurance companies incorporated in this state, which either from neglect or by vote of their members or officers, or in obedience to the decree of any court, have ceased or shall hereafter cease, for the period of one year, to transact the business for which they were organized, shall be deemed and held extinct in all respects as if they had expired by their own limitation; and the circuit courts shall have authority, upon application, by the petition of the auditor of the state, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns; provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors.

4. Insurance companies whose charters expire by their own limitation, or become forfeited by non-user, or are dissolved by decree of court, or otherwise, shall nevertheless be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized."

It appears also that on April 19, 1916, a majority in number and interest of the stockholders of the Illinois Surety Company filed a bill in the Superior Court of Cook County, Illinois, "To close said company and to procure a decree of dissolution of the corporation in the manner provided by law." That they enumerated the assets of the corporation in all states, and alleged that the corporation was insolvent and that if a receiver should not be appointed it would be subject to a multiplicity of suits and its property lost and depleted by expenses and unevenly distributed to its creditors. They asked that the

"Illinois Surety Company may be restrained by proper decree * * * from further prosecution of its business, * * * and that a receiver be appointed forthwith, to take charge of the estate and effects of said corporation, including all such securi-

ties as are deposited in this and other states, to collect the debts due and the property belonging to said corporation with power to prosecute and defend suits in the name of said corporation, or in the name of said receiver, and to do all other acts necessary for the collection, marshalling, and distribution of the assets of said Illinois Surety Company and the closing of its concerns."

On the same day, April 19, 1916, the Illinois Surety Company filed an answer to the bill, admitting all the allegations thereof, including insolvency.

On the same day, April 19, 1916, oral testimony was taken in the Superior Court of Cook County, Illinois, which found that the averments of the bill were true, and decreed

"1. That the said Illinois Surety Company, be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business."

On the same day the Superior Court made a separate order appointing a receiver of all the property of the corporation or held for its account wherever situated. The order gave the receiver

"power to prosecute and defend suits in the name of the Illinois Surety Company, or in his own name."

By virtue of the above order of the Illinois court enjoining the Illinois Surety Company from the further prosecution of its business the charter of the company must be deemed and held to have become extinct in all respects as if it had expired by its own
208 limitation after the lapse of one year from the date of the order as provided in section 3 of the Act of 1874 above quoted. But this corporation in accordance with the provision contained in section 4 of the same Act, also above quoted, continued to be a body corporate for the term of two years after the expiration of its charter for the purpose of prosecuting and defending suits by or against it and for the settlement of its affairs.

As the Illinois Surety Company was restrained from doing any business by court decree of April 19, 1916, its charter expired on April 19, 1917. As it was continued a body corporate by statute for two years and no more after its charter became extinct its existence ceased and it became dissolved for all purposes on April 19, 1919.

The receiver was never made a party to the action brought by Mackey in New York against the Illinois Surety Company. On April 18, 1919, the Superior Court of Cook County Illinois, which had appointed the receiver, directed him to discontinue any further defence of the Illinois Surety Company in the New York action and directed him to notify Mackey of the order. The order also directed Mackey to file his claims with the Master who had been appointed under an order of the Illinois court made on January 30, 1918. That order referred all actions pending in the several States against the Illinois Surety Company, and against the Illinois Surety Company and the receiver, and all disallowed claims to a master to hear the

evidence and report his conclusions of fact and law. Both of these orders appear to have been made on due notice to all parties entitled to receive notice. As soon as the order of April 18, 1919, was made the receiver directed the attorneys who had hitherto appeared for the Illinois Surety Company in the New York action to discontinue their appearance. They thereupon at once notified Mackey that their authority to represent the defendant in that action and to appear for it had been terminated and revoked. After this
209 notification Mackey made haste to obtain the judgment in the New York action which is the judgment involved in the suit now before this court, and for the payment of which it is claimed the present defendant must pay to the extent of its bond. That action it will be recalled had been commenced in May, 1915, and had been prosecuted, it must be admitted, with much indifference through a period of four years, there being no adequate explanation given of the reason for the delay.

The State which grants a corporate franchise has exclusive and supreme power to withdraw it. Morgan v. New York National Building Association, supra. When the State of Illinois which created the Illinois Surety Company terminated its existence its action was as decisive in New York as in Illinois. For as Chief Justice Taney said in Bank of Augusta v. Eearle, 13 Peters 519,588, "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. * * * It must dwell in the place of its creation, and cannot migrate to another sovereignty." The Supreme Court has often reaffirmed the statement. It must necessarily follow that a decree of dissolution of a corporation rendered in the State of its creation abates not only all actions pending by or against it in that State but in every other.

It was urged upon the argument that the language of Section 15 of the Illinois Insurance Law hereinbefore set forth and which provides for the forfeiture of charters for failure to transact business for one year requires that this failure to do business must be "in obedience to the decree of any court," and there was no such decree but only an interlocutory order. The language used by the court was:

" * * * and the court being fully advised in the premises, doth find from said bill and petition and answer and oral proof heard in open court that the averments in said bill and petition are true, and doth order, adjudge and decree as follows, without bond from the complainants and until the further order of court.

210 1. That the said Illinois Surety Company be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business.

2. That all the servants, agents officers and employees of said Illinois Surety Company, be and they are hereby restrained and enjoined from interfering with, copying or carrying away any of its books, papers, records, schedules, lists of policyholders, or other documents, or any copies thereof."

An interlocutory order is one made pending a cause and before final hearing on the merits and where further action is necessary. But the decree in this case by its language shows that it was made after the court was "fully advised in the premises" and that it was based not only on the "bill and petition and answer" but also upon "oral proof in open court" which satisfied the court "that the averments in said bill and petition are true." It was not necessary that any further steps should be taken, and it settled not some intervening matter but the cause itself. There was nothing left open which remained to be disposed of. The rights of the parties were determined by it. The object of an interlocutory order is to maintain the status quo. The object of a final decree is to determine the right in controversy. That was done by the decree which was entered in this case. This court has before decided that a decree does not lose its character as a final decree by adding the words "until the further order" of the court. That question has been settled for fifty years in the Federal Courts by the decision of the Supreme Court in French v. Shoemaker, 12 Wall. 86, 89. In that case leave was given, at the foot of the decree, to either party to apply for such further order as might be necessary or as might be required in relation to any matter not finally determined by it. The court in commenting upon it declared it to be "quite apparent that that reservation
211 was superadded to the decree as a precaution and not because the court did not regard the whole issue between the parties as determined by the decree."

In Commercial Loan & Trust Company v. Mollers, 242 Ill. 50 the court construed Section 10 of the General Corporation Law of that State, and which provided that corporations organized under the law should continue their corporate capacity "during the term of two years for the purpose only of collecting the debts due said corporation, and selling and conveying the property and effects thereof." It held that the Act applied only to corporations organized under it. It accordingly held that a corporation organized for banking purposes, and not organized under the General Corporation Law, was not affected by the two-year limitation and might rightfully enforce its claims against its debtors in the courts of the State until such indebtedness had become barred by the general Statute of Limitations. This, the court thought, was in accord with "the general public policy of the State which permits a corporation to do such acts as may be necessary to collect its debts and settle up its affairs after dissolution." In that case the banking corporation had been dissolved during the pendency of the action. Judgment was not actually entered in the suit until ten years thereafter, it was held that the action did not abate.

In Singer & Talcott Co. v. Hutchison 176 Ill. 48 the court construed Section 12 of the Corporation Law of the State which reads as follows:

"The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

The court in passing upon it said:

"While the corporate capacity of this corporation was continued for two years after the expiration of its charter, or until
212 April 10, 1894, in order to bring suits for the purpose aforesaid, its corporate capacity to be sued as a party defendant, for liabilities which accrued before its dissolution, was continued without limitation as to time, and therefore the general Statute of Limitations, only, would apply."

If the Illinois Surety Company had been subject to the General Corporation Law of the State instead of the Insurance Law of 1874 there might be ground for the contention that the judgment which Mackey obtained in New York after the two year period had expired was binding upon the Illinois Corporation. But if, as we hold it was, the corporation was subject to the Act of 1874 in regard to the dissolution of insurance companies, then it was not subject to the General Corporation Law of the State, or to the public policy of the State as announced in the two decisions last quoted. Our attention has not been called to any decision of the Supreme Court of Illinois, or of any of its other courts, construing Sections 3 & 4 of the Act of 1874, and in the absence of such a decision we must hold that the provision in Section 4, heretofore quoted, which continues bodies corporate after their charter had expired "for the term of two years" for the purpose "of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their concerns" is a period of limitation and that no judgment can be entered in any action, against any corporation subject to its provisions, unless it is done within the period so prescribed.

Counsel for the plaintiff directs our attention to the language used at the end of Section 13 of the Insurance Law wherein it is expressly said that "this section shall not be contrued to relieve any such company from its liabilities to the assured or to any of its creditors."

That section provides that the charter of the corporation ex-
213 pires by limitation at the end of the one year period, and that the fact that it has expired shall not relieve it from liabilities to creditors. But it is not claimed that the company is relieved from liabilities to creditors by Section 13. It is claimed that it is relieved under Section 14. That Section provides that after the corporation has been dissolved at the end of one year under the provisions of Section 13 it shall be continued for the term of 2 years more for the purposes mentioned. The relief from liability plainly comes at the end of this additional period of 2 years under the provision of Section 14.

There are other assignments of error which we have examined and found without merit.

Judgment Affirmed.

214 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 14th Day of March, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

JOHN EWEN, Plaintiff in Error,

v.

AMERICAN FIDELITY COMPANY, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

H. W. R.
C. M. H.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

215 [Endorsed:] United States Circuit Court of Appeals Second Circuit. John Ewen v. American Fidelity Company. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Mar. 14, 1921. William Parkin, Clerk.

216 United States Circuit Court of Appeals, Second Circuit.

Filed Mar. 31, 1921. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

JOHN EWEN, Plaintiff-in-Error (Plaintiff Below),

against

AMERICAN FIDELITY COMPANY, Defendant-in-Error (Defendant Below).

To the United States Circuit Court of Appeals for the Second Circuit:

John Ewen, plaintiff-in-error in the above entitled suit, feeling himself aggrieved by the decision rendered March 2, 1921, hereby petitions this Court to grant a re-hearing or re-argument of the writ on the ground that as appears by the opinion of this Court affirming the judgment of the District Court appealed from, this Court misconceived or overlooked material questions of fact and law, and errors therein arose by reason of either not considering or failing to give sufficient weight to the facts of the record, and consequently misapplied the law, as will more fully and at large appear.

217 *Specifications of Errors.*

I. The court misconceived the facts relating to the prosecution of the action of Mackey v. Illinois Surety Company, No. 2.

The opinion says:

"That action, it will be recalled, had been commenced in May, 1915, and had been prosecuted, it must be admitted, with much indifference through a period of four years, there being no adequate explanation given for the reason for the delay."

The Court has evidently overlooked the pendency of the action of Mackey v. Illinois Surety Company No. 1, and the additional fact that Action No. 2 could not be prosecuted to judgment until the issues raised by the counterclaims (which were the same in both actions) had been tried and judgment rendered in Action No. 1.

The order of reference in Action No. 2 provided (fol. 267):

"That only the excess of the counterclaims in Action No. 1 over the amount, if any, found due on plaintiff's cause of action in Action No. 1 shall apply to or be applied as a setoff in this action, and the amount thereof, if any, so applied as a setoff in this action, shall be allowed to the plaintiff herein as a credit upon any judgment recovered by the plaintiff in Action No. 1."

Action No. 1 was brought for commissions accruing up to December, 1914. Action No. 2 was merely supplemental, and to re-

cover commissions accruing after the commencement of Action No. 1 (fol. 131). The testimony showed that the reference in Action No. 1 proceeded continuously after the remand until its com-
218 pletion and submission with Action No. 2 to the referee in August, 1918 (fols. 130, 131). Whatever delays occurred in Action No. 1 were due to the delay in obtaining a decision of the Appellate Division on the question of removal (fol. 130), (Mackey v. Illinois Surety Co., 172 A. D., 966), and to delays obtained by the receiver therein (fol. 138).

The nature of the counterclaims will explain the reason for the great length of the reference in which there were over 1,000 pages of minutes taken and over 300 exhibits offered, and which cost Mr. Mackey in disbursements alone, over $1,000.

The first counterclaim alleged a liability of Mackey for different classes of premiums either collected or which became due during the course of his agency, covering a period of nearly six years (fols. 309-311). It gave him credit for certain payments and commissions thereon, and asked judgment for the balance. The proof, following these allegations, was by offer of the books of the agency showing this enormous volume of premiums during this period, and to concede certain credits. This required on his part checking up of these premiums, and proofs as to the payments or credits made. As he was merely in charge of the agency, the books and papers relating to this six year period were in the possession of the defendant very largely in Chicago, and with the delays in obtaining them, and the months of work of accountants alone, an enormous amount of time and labor was involved.

The same condition existed as to the second counterclaim in which the defendant's prima facie case was made by proving the entire amount of collateral moneys received, requiring Mr. Mackey
219 to prove in detail its return, application or remission to the defendant, either directly or by credits. (See Sagone v. Mackey, 225 N. Y., 594.)

That the proof fully met these counterclaims, is evidenced by the fact that, although, after the referee's death, Mr. Mackey offered that this record be presented to the Court or to a new referee, the receiver refused to consent (fols. 143, 474, 485).

It was, and is, impractical to try this action again before this Court. But your petitioner urges that this Court should not be influenced by an erroneous view of the facts bearing on the merits of the claim against the Illinois Surety Company.

II. It was error for this Court to find that the order of April 19, 1916, which provided that the Court

"doth order, adjudge and decree as follows without bond from the complainants and until the further order of the Court:

1. That the said Illinois Surety Company be and forthwith it is restrained, enjoined and forbidden from further prosecution of its business.

2. That all the servants, agents, officers and employees of said Illinois Surety Company be and they are hereby restrained and enjoined from interfering with, copying or carrying away any of its books, papers, records, schedules, lists of policy holders or other documents, or any copies thereof."

was a decree determining the issues in the action.

(*a*) The Court has overlooked the decision of the Illinois Supreme Court, in Ward v. Farwell, 97 Ill., 593, which determined that such an order made under exactly the same conditions as here, is not

"a final order or decree upon the merits * * * restrain-
220 ing it from the further continuance of business."

There as here a proceeding was brought for dissolution of an insurance corporation under the provisions of "An act in regard to the dissolution of insurance companies."

There as here the corporation answered admitting all the allegations of the petition.

There as here an order was made restraining the corporation, its officers and agents "until the further order of the Court from further proceeding with their said business," and a receiver appointed.

No hearing on the facts had been held, but this was found by the Court unnecessary. It nevertheless decided that the order was not a decree determining the issues, saying at page 619 as follows:

"As the facts in the petition were admitted the necessity of a hearing was obviated; but the Court should before appointing the receiver, have entered a final order or decree upon the merits either dissolving the corporation or restraining it from the further continuance of its business."

(*b*) The Court has overlooked the construction which the Illinois Courts had placed upon this order. The order appointing the receiver, made immmediately thereafter, refers to it, not as a decree, but as "the order restraining and enjoining and forbidding said Illinois Surety Company from further prosecution of its business" (fol. 548).

The order appointing the receiver made thereafter further retains jurisdiction "until final hearing."

After the entry of this order, both the Attorney General and Superintendent of Insurance were made parties defendant, and al-
221 lowed to file answers.

Evans v. Illinois Surety Co., 201 Ill. App., 578;
Evans v. Potter, 204 Ill. App., 212.

If the order referred to was a decree determining the right in controversy, there could have been no object in brining any additional defendants and allowing answers to be served. Furthermore, in the

appeal from the order making the Superintendent of Insurance a party, the Illinois Court said:

"This is not the time to review the order appealed from. Whenever the cause reaches a stage where a final appealable order is entered, then the right of the Court to permit an intervening petitioner to become a defendant will be open to review."

It further referred to the possibility of the rereceiver being "compelled to restore such diverted funds or assets to the Surety Company."

(c) The Court has overlooked the fact that except as a provisional remedy incidental to the general equity powers of the Court, and for the purpose of preserving the status quo, the Illinois Court had no power in a stockholders' action to render any final relief, except to "after due notice to all parties interested * * * and for reasonable cause decree a dissolution of the corporation." (Insurance Law, Sec. 2.)

The order, as this Court has construed it, effects a dissolution under Section 3 of the act. Specific authority has been given to the Courts to make such a decree in an action by the auditor (Sec. 1), but not in an action by stockholders (Sec. 2). But courts of equity,
222 in the absence of specific statutory authority, have no jurisdiction to decree dissolution of corporations.

Wheeler v. Pullman C Co., 143 Ill., 197;
Hunt v. Le Grand, 143 Ill., 118;
Baker v. Backus, 32 Ill., 79;

This order treated as the decree of dissolution authorized by Section 2, could not be made until after hearing, and on notice not merely to the corporation but to "all the parties interested," necessarily including the minority stockholders.

14 A Corpus Juris., 1142;
Watson v. U. S. Sugar Refining Co., 68 Fed., 769;
Baker v. Backus, 32 Ill., 79, 96.

Neither could it be made until after notice to the Superintendent of Insurance and the auditor, who were subsequently made parties.

III. The Court erred in concluding that the order enjoining the Illinois Surety Company from transacting business "until the further order of the court" was a decree determining the issues in the dissolution action.

The Illinois Court's power to make such decree was limited by Section 2 of the Act, by which it might "for reasonable cause decree a dissolution of the corporation."

The bill of complaint alleged insolvency of the corporation. But while the Court, in the order referred to, found that such insolvency existed, it did not find that such insolvency was reasonable cause for granting a dissolution, which was the issue in this action. Insolvency alone is not "good cause" for dissolution. (Wheeler v. Pullman I. S. Co., 143 Ill., 197.) Insolvency, moreover, is a con-

dition curable by the injection of new capital, and until the
223 minority stockholders could be heard, and given, if they desired, an opportunity to make such additional investment, the Court might well decline to grant a final decree.

The order does not attempt to determine that question nor does it grant the relief prayed for in the bill, which clearly shows that the restraining order asked, as also the order appointing the receiver, were merely provisional remedies to preserve the status quo.

The prayer of the bill of complaint, which is not quoted in full in the opinion, makes this clear, and asks (fols. 521, 522):

1. That the surety company be restrained from further prosecution of its business.

2. That a receiver be appointed.

These are the portions of the prayer quoted from at page 8 of the opinion. Then follows the further prayer:

3. "That said Illinois Surety Company may be compelled to answer this bill and petition," and

4. "That upon a final hearing a decree may be entered herein dissolving the said Illinois Surety Company and providing for the distribution of its assets to its creditors," etc.

The order does not attempt to adjudge upon the last portion of the prayer, which was the right to be passed upon in this action, and which was the question upon the determination of which the Court's jurisdiction rested.

An order granting the relief prayed in the bill of complaint even though made after trial of the issues, which did not contain a decision of the issues did not become the decree in the action.

Tenabo Mining & Smelting Co. v. Bates, 220 Fed., 756.

224 IV. The Court overlooked the distinction between an order granting an injunction "until the further order of the Court" and a decree granting a permanent injunction with leave to apply for further relief.

If this was a final decree adjudging the issues, then it could only be attacked or changed on a rehearing or by writ of error or appeal. It is evident that as the injunction was only to continue "until further order of the Court" that the injunction against further transaction of business was not final, but might be modified or dissolved on motion. This was actually done in this case since on July 10, 1916, an order was made in the cause, providing (fol. 443):

"It is hereby ordered that leave be and the same is hereby given to said James S. Hopkins, receiver * * * to continue and carry on the business of said Illinois Surety Company under the directions of this Court * * * until the further order of this Court."

This was less than two years prior to the entry of judgment in Mackey v. Illinois Surety Company.

This distinction between an interlocutory order and a decree is emphasized in Forgay v. Conrad, 6 How., 201, cited as the basis of the decision in French v. Shoemaker, 12 Wall., 86, referred to in the opinion of this Court, where it was held that the right to make application at the foot of the decree for further order to carry out the decree did not deprive it of its character as a final decree.

At page 204, Chief Justice Taney, in Forgay v. Conrad, supra, said:

"And according to the last paragraph in the decree the bill is retained merely for the purpose of adjusting the accounts re-
225 ferred to the Master. In all other respects the whole of the matters brought into controversy are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the Court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for rehearing."

The order in this instance comes directly within the definition of this Court in Gas Electric S. Co. v. Manhattan & Queens Trac. Corp., 266 Fed., 625, at 632, as follows:

"An interlocutory injunction is one granted prior to the final hearing and determination of the matter in issue, and which is to continue * * * until the further order of the Court."

This order while made upon a hearing was made "prior to the final hearing" prayed for in the bill of complaint, and provided for in the order granting the injunction (subsequently made), in which "jurisdiction is hereby expressly retained until final hearing and settlement thereafter of all unfinished business of said Illinois Surety Company and the receivership herein."

V. The Court overlooked the fact that the Illinois Surety Company was subject to the General Corporation Law of Illinois. The opinion says:

"If the Illinois Surety Company had been subject to the General Corporation Law of the State, instead of the Insurance Law of 1874, there might be ground for the contention that the judgment which Mackey obtained in New York after the two year period had expired was binding upon the Illinois Surety Corporation."

The Surety Corporation Act, however, expressly provides by Section 14—

226 "Corporations organized under this act shall be subject to all laws of this State governing corporations for pecuniary profit as provided for in 'an act concerning corporations' * * * and shall have the powers thereof so far as the same are not inconsistent with the provisions of this act."

VI. The Court overlooked the provision of Section 3 of the Insurance Act that where a corporation has become extinct owing to failure to transact business for one year, pursuant to decree of court,

"the Circuit Court shall have authority upon application by the petition of the auditor or the State or of any person interested, to fix by decree the time within which such companies shall close their concerns."

No such decree has been made. The right to "close their concerns" after formal dissolution is held to continue the corporate life for purpose of pending actions so that the same do not abate.

Lessee v. State Bank, 1 Wall. 23;
Dundee M. & T. R. Co. v. Hughes, 89 Fed., 182;
Board of Councilmen v. Deposit Bank, 124 Fed., 19.

VII. The Court erroneously assumed that Section 4 of the Insurance Law operates as a limitation on the corporate existence.

The opinion, in referring to the language of Section 3, which says—

"This section shall not be construed to relieve any such company from its liabilities to the assured or to any of its creditors."

Says,

"that section provides that the charter of the corporation ex-
227 pires by limitation at the end of the one year period, and that the fact that it has expired shall not relieve it from liabilities to creditors, but it is not claimed that the company is relieved from liabilities to creditors by Section 13 (3); it is claimed that it is relieved under Section 14 (4)."

But if the saving clause in Section 3 preserves the rights of creditors so that standing alone it continues the corporate life as to them indefinitely, and prevents abatement of actions, it cannot be held that Section 4, which preserves certain rights for the benefit of the corporation, cuts down these rights of creditors, without ignoring the construction which the Illinois courts have given to Sections 10, 11 and 12 of the General Corporation Law.

Section 12 of the General Corporation Law provides:

"The dissolution, for any cause whatever, of any corporation, created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liabilities incurred previous to its dissolution."

The opinion herein notes that Singer & Talcott v. Hutchinson, 176 Ill., 48, decides that the effect of this provision, which is identical with the saving clause in Section 3 of the Insurance Law, prevents abatement of actions against a dissolved corporation, and by it—

"its corporate capacity to be sued as a party defendant for liabilities which accrued before its dissolution, was continued without limita-

tion as to time and therefore the General Statute of Limitations only would apply."

The same case also construes Sections 10 and 11 of the General Corporation Law, which provide:

228 "Section 10. All corporations organized under this law, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity during the term of two years for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof.

"Section 11. Such corporations shall use their respective names for the purposes aforesaid, and shall be capable of prosecuting and defending all suits in law or equity."

Section 14 of the Insurance Law is a combination of these two sections of the General Insurance Law, and provides:

"Insurance companies whose charters expire by their own limitation or become forfeited by non-user, or are dissolved by decree of the court or otherwise, shall nevertheless be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized."

The only substantial difference is that in Section 10 of the General Corporation Law, the word "only" is used, where in Section 14 of the Insurance Law, the word "nevertheless" is employed, indicating, not a restriction, but a grant of additional rights.

If Section 4 of the Insurance Law is a limitation of the rights given to creditors under Section 3, then necessarily Sections 10 and 11 of the General Corporation Law must be limitations on the creditors' rights given in Section 12, and vice versa.

The Illinois courts have held, however, that the two pro-
229 visions were entirely independent; that the rights preserved to creditors in Section 12 are not in any way affected by the provisions of Sections 10 and 11, which have for their purpose the preservation of rights of the corporation, the Court saying in Singer & Talcott v. Hutchinson, supra:

"It is evident that Sections 10 and 11 were enacted for the benefit of the corporation but fixing a limitation on the term of its continued existence for the sole purpose expressed. While Section 12 was enacted for the benefit of those whose rights had accrued against the corporation previous to its dissolution without any limitation as to time other than the General Statute of Limitations applicable."

VIII. The Court overlooked the case of

Graham & Morton Co. v. Owens, 165 Ill. App., 100.

which holds that the two year period is merely one of limitation on the commencement of actions or entering into defense, and that the expiration of the two years does not operate to abate actions brought prior thereto. See also

14 A Corpus Juris, p. 1165, footnote 44.

IX. The Court overlooked the effect of the provisions in the order appointing the receiver, giving him power to "defend suits in the name of the Illinois Surety Company."

It also erred in concluding that the receiver was never a party to the New York action.

When it is provided that, despite formal dissolution, pending actions may be defended by the receiver in the name of the corporation, it is obvious that the corporate life is continued for purposes of such actions, and that they do not abate, even although the re-
230 ceiver does not undertake the defense.

Life Assurance Assn. of America v. Fassett 102 Ill., 315.

It was also so determined by the United States Supreme Court in Pease v. Rathbun-Jones Eng. Co., 243 U. S., 273, 277, where it is said:

"It is contended that all suits pending against the People's Light Company abated upon its dissolution. As we read the Texas statute (Rev. Stat. 1911, Art. 1206), such a consequence is carefully avoided. It is there provided that upon dissolution the president and directors shall be trustees of the creditors and stockholders of the corporation 'with full power to settle its affairs' and with power 'in the name of such corporation * * * to collect all debts and compromise controversies, maintain or defend judicial proceedings.'"

There is no valid distinction between such power given a receiver pursuant to statute and a similar power given to trustees created by statute.

The existence of this power, indicating an intention to keep the corporation alive for purposes of suit, regardless of its exercise, prevents abatement. Here, however, there was also exercise of the power by the receiver and he thereby did become a party to the action in the manner provided in the order appointing him. In his petition to pay counsel for services, he says (fol. 458):

"That since his appointment as receiver he continued said firm in the cases that were pending in the courts in the City of New York, in which they had previously appeared as attorneys for the Illinois Surety Company, at the time that said Illinois Company went
231 into the hands of a receiver, and for the services that have been rendered since your petitioner was appointed receiver Messrs. Kellogg & Rose have charges on their books aggregating the sum of $3,981.91," etc.

Such counsel further spread upon the record a statement:

"I am retained and paid by the receiver * * * and told to go ahead with this action and I am doing so in the name of the company" (fols. 207, 208).

This was done to obviate objection made in that action that unless it formally appeared that the receiver was defending the action that he would subsequently disclaim the binding effect of any judgment (fol. 210).

If the order of April 19, 1916, was a decree determining the issues in this action, then it was the equivalent of a decree of dissolution, since that was the only decree which the court had power to make in a stockholders' action under Section 2 of the act.

If Section 4 was a limitation on the corporate existence, then by Section 4 the corporate life was continued "for the term of two years after * * * dissolution," or, until April 19, 1918. The action did not then abate, since the receiver continued its defense until the termination of the reference in August, 1918, and it could not be claimed that it subsequently abated simply because the receiver discontinued further defense.

In conclusion, it is respectfully requested that this Court grant a reargument in this case for the reasons above set forth, in consequence whereof the petitioner feels that he has not had his day in court in this case.

Wherefore your petitioner respectfully prays for a rehearing
232 or reargument of this appeal, in order that the matters as above outlined, may be more fully presented to this Court.

Dated March 28, 1921.

JOHN EWEN,
Petitioner.

STATE OF NEW YORK,
County of New York, ss.

John Ewen, being duly sworn, deposes and says that he is the plaintiff-in-error and the petitioner herein; that he has read the foregoing petition, and that the facts alleged therein are true.

JOHN EWEN.

Sworn to before me this 28th day of March, 1921.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

William R. Wilder, being duly sworn, say that he is one of the attorneys and counsel for the plaintiff-in-error in the above entitled suit and he does hereby certify that he has examined the foregoing

petition for a rehearing herein, and that in his opinion the facts therein set forth are sufficient to entitle the said plaintiff-in-error to a rehearing, and he further certifies that in his opinion the petitioner has, upon the pleadings and proofs in this suit, a just and equitable claim to the relief asked, and that this petition is filed in good faith and not for the purpose of delay.

WILLIAM R. WILDER.

Sworn to before me this 28th day of March, 1921.

RUDOLPH DUGAN,
Notary Public, Nassau County.

Certificate filed in New York County.

233 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit Held at the Court Rooms, in the Post Office Building, City of New York, on the 16th Day of April, 1921.

Present:

Hon. Henry Wade Rogers,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

JOHN EWEN, Plaintiff in Error,

v.

AMERICAN FIDELITY COMPANY, Defendant in Error.

A petition for a rehearing having been filed herein by counsel for the Plaintiff in Error;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

H. W. R.
M. T. M.

234 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 233, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of John Ewen against American Fidelity Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 22d day of April

in the year of our Lord One Thousand Nine Hundred and twenty-one and of the Independence of the said United States the One Hundred and forty-fifth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

235 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which John Ewen is plaintiff in error, and American Fidelity Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
236 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY.
Clerk of the Supreme Court of the United States.

237 [Endorsed:] File No. 28,303. Supreme Court of the United States, October Term, 1921. No. 348. John Ewen vs. American Fidelity Company. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 3, 1921. William Parkin, Clerk.

238 Circuit Court of Appeals for the Second Circuit.

JOHN EWEN, Plaintiff in Error,

against

AMERICAN FIDELITY COMPANY, Defendant in Error.

It is hereby stipulated by and between the parties to the above entitled action, that the certified copy of the record in the above entitled cause, heretofore filed in the Supreme Court of the United States by the plaintiff in error, as part of his petition for a writ of

certiorari, may be taken as the return to the said writ, dated October 22, 1921, and when this stipulation may have been filed with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, a certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States as his return to the said writ of certiorari.

Dated, October 28, 1921.

WILDER, EWEN & PATTERSON,
Attys. for Plaintiff in Error.
ELKUS, GLEASON, VOGEL & PROSKAUER.
Attys. for Defendant in Error.

239 & 240 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings, whereof mention is within made, having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the Stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 3rd, 1921.

[Seal of United States Circuit Court of Appeals Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

241 & 242 [Endorsed:] 348. 28,303. United States Circuit Court of Appeals, Second Circuit. John Ewen v. American Fidelity Company. Return to Certiorari.

243 [Endorsed:] File No. 28,303. Supreme Court U. S., October Term, 1921. Term No. 348. John Ewen, Petitioner, vs. American Fidelity Co. Writ of certiorari and return. Filed Nov. 14, 1921.

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Supreme Court of the United States

OCTOBER TERM, 1922.

No. 92.

JOHN EWEN,
Petitioner,

against

AMERICAN FIDELITY COMPANY,
Respondent.

BRIEF FOR PETITIONER, PLAINTIFF BELOW.

Statement of Case.

This cause comes to this Court on certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its judgment which affirmed a judgment rendered at law by the District Court of the United States for the Southern District of New York, in favor of the respondent, the defendant below, and against the petitioner, the plaintiff below.

The single question involved in this action is and was whether prior to June 21, 1919, the Illinois Surety Company, an Illinois corporation, had been dissolved and rendered *civiliter mortuus*, so that a judgment entered against it on that day, and

secured by the bond of the respondent, on which this suit was brought, was void and ineffectual.

The District Court and the Circuit Court of Appeals have decided that the Illinois Surety Company was so dissolved by virtue of an order restraining it from further prosecution of its business "until further order of Court," and an order appointing a receiver of its assets, both made on April 19, 1916, in a statutory action brought in the Courts of Illinois to secure its dissolution, also that certain statutes of Illinois, which preserve the corporate existence after dissolution for purposes of suit, do not apply to surety corporations.

Since the decision of the Circuit Court of Appeals, the Illinois Supreme Court has decided that no decree of dissolution of the Illinois Surety Company has been or could be yet entered, and that the saving clauses of the General Corporation Law which preserve corporate existence after dissolution for purposes of suit, do apply to surety corporations.

Evans v. *Ill. Surety Co.*, 298 Ill., 101.

The case involves the consideration and construction of certain statutes of the State of Illinois contained in "An Act to provide for the organization, management and regulation of surety companies," in force April 19, 1899 (*Hurd's Rev. Statutes of Illinois*, Ch. 32, §§ 102f to 102w), which we shall refer to hereafter as the Surety Company Law, "An Act concerning corporations," approved April 12, 1872, in force July 1, 1872 (*Hurd's Rev. Statutes of Illinois*, Ch. 32), known as the "General Corporation Law," and "An Act in regard to the dissolution of Insurance Companies," approved February 17, 1874, in force July 1, 1874 (*Hurd's*

Rev. Statutes of Illinois, Ch. 72), forming part of the Insurance Law.

These statutes, so far as material to the questions involved, are printed in full as an appendix to this brief.

Facts.

The Illinois Surety Company is a corporation organized under the provisions of the Illinois Surety Company Law, and formerly conducted business in the State of New York.

On May 11, 1915, the petitioner's assignor, David C. Mackey, a former agent, commenced an action against it in the New York Supreme Court, Kings County, to recover commissions on premiums upon bonds procured by him during his agency. This action was entitled "Action No. 2," to distinguish it from a prior action then pending brought by him to recover like commissions, covering a different period.

In Action No. 2 he attached certain property of the Illinois Surety Company in the State of New York, and the attachment was released on July 10, 1915, upon the giving of the bond sued upon herein, executed by the respondent, under which it undertook to pay any judgment, up to the sum of $7,500, which might be recovered by Mackey in that action (p. 2).

The Illinois Surety Company asserted a large counterclaim against Mackey, which it had also set up in Action No. 1 and the other issues, except as to the premiums as to which commissions were sought, were the same in both actions. Accordingly, after Action No. 2 was reached for trial, it was by stipulation referred to the Referee before whom Action No. 1 was then on trial. It was stipu-

lated that the testimony taken theretofore and thereafter should apply to both actions and they were thereafter tried together.

On April 19, 1916, a majority of the stockholders of the Illinois Surety Company filed a bill in equity (Defendant's Exhibit B, p. 97) against the Illinois Surety Company, in the Superior Court of Cook County, Illinois, the bill alleging insolvency of the Company,

> "to close said company and procure a decree of dissolution of the corporation in the manner provided by law."

The prayer of the bill, which is not quoted in full in the opinion of the Circuit Court, the material portions omitted being those in italics, is as follows:

> "Your petitioners * * * pray this Honorable Court that the said Illinois Surety Company may be restrained by proper decree * * * from further prosecution of its business * * * that a receiver be appointed forthwith, with all the usual powers and duties of receivers in equity, to take charge of the estate and effects of said corporation, including all such securities as are deposited in this and other states; to collect the debts due and the property belonging to said corporation with power to prosecute and defend suits in the name of said corporation, or in the name of the receiver, and to do all other acts necessary for the collection, marshalling and distribution of the assets of the said Illinois Surety Company, and the closing of its concerns: *that said Illinois Surety Company may be compelled to answer this bill and petition * * * and that upon a final hearing, a decree may be entered herein dissolving*

the said Illinois Surety Company and providing for the distribution of its assets to its creditors."

That action was brought pursuant to the provisions of Section 2 of "An Act in regard to the dissolution of Insurance Companies," which by the Surety Company Law is made applicable to surety companies. This section is as follows:

> "§2. When a majority, in number or interest, of the members or stockholders of any insurance company incorporated in this state, desire to close its concerns, they may apply by petition to the circuit Court of the circuit in which the company is located, setting forth in substance the grounds of their application; and the court, after due notice to all the parties interested, may proceed to hear the matter, and for reasonable cause decree a dissolution of the corporation; corporations so dissolved shall be deemed and held extinct in all respects as if their charters had expired by their own limitation, subject, however, to the provisions hereinafter prescribed."

With the bill was filed an unverified answer by which the Illinois Surety Company waived service of notice and the issuance of a summons, and admitted all allegations of the bill (Deft's Exh. B2, p. 104), both bill and answer being filed at 4:51 P. M.

On the same day, April 19, 1916, the Superior Court made an order (Deft's Exh. B3, p. 106) which the Circuit Court of Appeals has held to be *the final decree* in the action, determining the merits and effecting the dissolution of the corporation.

This order recites the filing of the bill and the answer, and provides:

"and the Court, being fully advised in the premises, doth find from the said bill and petition and answer, and oral proof heard in open court, that the averments in said bill and petition are true, and doth order, adjudge and decree as follows, *without bond from the complainants and until further order of Court;*

"1. That the said Illinois Surety Company be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business.

"2. That all the servants, agents, officers and employees of said Illinois Surety Company, be and they are hereby restrained and enjoined from interfering with, copying or carrying away any of its books, papers, records, schedules, lists of policy holders, or other documents, or any copies thereof."

On the same day April 19, 1916; a further order was made appointing a receiver (Deft's Exh. B4, p. 106). This order refers to the previous order as "the *order* restraining and enjoining and forbidding the said Illinois Surety Company from further prosecution of its business," and provides that the Court

"doth order, adjudge and decree that James S. Hopkins * * * be * * * appointed receiver of the said Illinois Surety Company and of all and singular the real estate, personalty, choses in action * * * belonging to the said Illinois Surety Company * * * *with power to prosecute and defend suits in the name of the Illinois Surety Company, or in his own name, to appoint agents under him, and an attorney or attorneys to prosecute and defend suits* * * *."

This order also provides that:

> "jurisdiction is hereby retained *until final hearing and settlement thereafter* of all unfinished business of said Illinois Surety Company and the receivership herein."

It also provides that

> "good cause being shown, said complainants are hereby excused from giving a bond as a condition to the appointment of a receiver herein."

After his appointment the receiver retained the services of the attorneys who had previously represented the Illinois Surety Company in the actions brought against it in New York by Mackey, and through them continued their defense until April 28, 1919, and paid them in pursuance of authority of the Superior Court of Illinois (Plff's. Exh. 6 D, p. 89; Plff's Exh. 6 E, p. 91). This defense was continued in the name of the Illinois Surety Company under instructions of the receiver, and a statement was spread on the record to that effect (p. 40).

The taking of testimony in these actions before the Referee was completed and the reference closed in July, 1918 (p. 26) but before the referee could render his decision he died, and the reference terminated (p. 26). Mackey then offered, in order to avoid the delay and expense of an entirely new trial, to consent that the evidence taken before the Referee be submitted to a new Referee or Judge, but this offer was refused by the receiver (pp. 92, 94). The appointment of a new referee was delayed owing to various causes, but principally at the request of the receiver and his attorneys, until after April 18, 1919 (pp. 27, 92-95),

on which date an order was made in the dissolution proceeding (Deft's. Exh. B 7, p. 113) on petition of the receiver, reciting the actions brought by Mackey, and that

> "the interests of the creditors of the Illinois Surety Company will be best subserved by directing the receiver to take no further action,"

and directing that the receiver

> "discontinue any further defense in either of said cases wherein said David Clinton Mackey is plaintiff and the Illinois Surety Company is defendant."

It also instructed the receiver to notify Mackey of the order and allowed him sixty days to file his claim with the receiver in the dissolution proceedings.

A motion was then made for the appointment of a new referee in the New York actions, but before the motion was heard, the receiver's attorneys served notice that they were no longer authorized to appear (p. 31). A new referee was appointed and in the proceedings before him the defendant did not appear by counsel.

Notice of all subsequent proceedings was however, given to the New York attorneys who had appeared in the action, to the receiver and to the defendant (p. 32), and the same evidence was offered before the second referee which had been presented to the first (p. 32), as the result of which judgment was rendered in action No. 2 in favor of Mr. Mackey and against the Illinois Surety Company, on June 21, 1919, for the sum of $37,041.95.

This judgment and all claims under the bond given by the respondent herein to discharge the attachment were assigned to the petitioner herein

(Plff's. Exhs. 3 and 4; pp. 77, 78). Demand for payment of the judgment was made upon the Illinois Surety Company and its receiver and refused (pp. 24, 82).

On August 29, 1919, the petitioner, a resident of New York, as assignee of all Mackey's rights, commenced the present action against the respondent, American Fidelity Company, a Vermont corporation, to recover upon its bond given to secure the judgment, and seeking to recover $7,500, the penalty therein, with interest.

The action was brought in the New York Supreme Court, New York County and was removed to the District Court of the United States for the Southern District of New York on the ground of diversity of citizenship.

The defendant thereafter answered, alleging that prior to the recovery of judgment against it, the Illinois Surety Company had been dissolved and ceased to exist.

The case was tried before Hon. Edward E. Cushman, District Judge, and a jury of one (p. 19), and at the close of the trial a verdict was directed for the defendant, the Court saying (p. 42):

> "When this corporation was declared insolvent, it probably should be considered that that proceeding involved two things, that is, a decree of dissolution, and the collection and distribution of the assets * * *. The Court is forced to the conclusion that upon the appointment of the receiver the corporation did cease to function and to do business as a corporation, the non-user provided or called for by the statute came into effect, and that this period provided for in Section 14 began to run."

A writ of error to the Circuit Court of Appeals

for the Second Circuit was allowed on June 23, 1920 (p. 1) and was decided March 2, 1921, in an opinion by Judge Rogers, concurred in by Judges Hough and Manton (p. 118) and an order of affirmance was made March 14, 1921 (p. 126). A petition for rehearing was denied April 16, 1921 (p. 137).

Decision of Circuit Court of Appeals.

The Circuit Court in affirming the judgment of the District Court decided the following propositions:

1. That the order of April 19, 1916, restraining the Illinois Surety Company from prosecuting its business "until the further order of court" was the final decree determining the issues in the dissolution action, and was the decree referred to in the first part of Section 3 of the Insurance Dissolution Act, providing:

> "The charters of all insurance companies incorporated in this state which either from neglect * * * or in obedience to the decree of any court have ceased, or shall hereafter cease for the period of one year to transact the business for which they were organized, shall be deemed and held extinct in all respects as if they had expired by their own limitation * * *."

2. That no judicial action was required after the expiration of this one-year period to bring about final dissolution, despite the subsequent provision of Section 3:

> "and the Circuit Court shall have authority upon application by the petition of the auditor of the state, or of any person interested, to

> fix by decree the time within which such companies shall close their concerns. * * *"

3. That the further saving clause contained in Section 3 of the Insurance Law

> "that this section shall not be construed to relieve any such company from its liability to the assured or any of its creditors,"

did not continue the corporate life for the purpose of being sued, so as to prevent the abatement of actions pending against it.

4. That the Illinois Surety Company, under the Surety Company Law, was not subject to the provisions of Section 12 of the General Corporation Law, to the effect that:

> "The dissolution for any cause whatever of any corporation created as aforesaid, shall not take away or impair any remedy against such corporation, its stockholders or officers for any liabilities incurred previous to its dissolution."

which section has been construed to continue the corporate life indefinitely for the purpose of entry of judgment against it in any suit commenced within the period allowed by the Statute of Limitations.

5. That, therefore, the provisions of Section 4 of the Insurance Dissolution Act that

> "Insurance companies whose charters expire by their own limitation, or become forfeited by non-user, or are dissolved by decree of court or otherwise, shall, nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and

> defending suits by or against them, and of enabling them gradually to settle and close their concerns. * * *,"

limit the corporate existence for the purpose of defending suits to the period of two years, so that actions brought before the expiration of the two-year period abate at its expiration.

6. That the appointment of a receiver, with power to defend actions in the name of the company, and his assumption of such defense, did not operate to preserve the corporate life for the purposes of that action.

While immaterial to the issues in this action, Judge Rogers in his opinion states that the attachment action

> "had been prosecuted with much indifference through a period of four years, there being no adequate explanation given of the reason for the delay,"

we believe that in so saying he overlooked undisputed evidence which showed that the action had been completely tried and that whatever delay there was, was due to the dilatory tactics of the receiver and his attorneys (pp. 66, 92-95, Petition for Rehearing, pp. 127-128).

The opinion also refers to certain orders made in the dissolution action requiring creditors to file claims. Since Mackey was not a party to that action, although those orders might have barred his participation in the assets administered by the Illinois courts, they had no effect on the attachment suit in New York.

Met. Rubber Co. v. *Place*, 147 Fed., 90.

The Supreme Court of Illinois has, moreover,

since held in the dissolution action that the Court had no power to impose any limitation on the time within which claims may be presented to the receiver, short of two years after a decree of dissolution shall have been entered, which decree of dissolution it decides has not yet been made.

Evans v. *Ill. Surety Co.*, 298 Ill., 101, at pp. 117-118.

Certiorari was issued by this Court to the Circuit Court of Appeals on October 22, 1921, and the case comes on for hearing upon the record filed in response to the writ.

ASSIGNMENTS OF ERROR.

The error complained of consists solely in the determination of the courts below that at the time of the entry of the judgment against the Illinois Surety Company, it had been dissolved and ceased to exist.

The assignments of error (pp. 114, 115) raise this question in various forms. The assignments of error numbered 1 to 7 relate to the receipt of evidence of the proceedings in the dissolution action. Those numbered 8 to 11, inclusive, except to the Court's action in denying the plaintiff's motion for direction of a verdict, and in granting the defendant's motion for such direction, and to the action of the Court in entering judgment in favor of the defendant.

ARGUMENT.

POINT I.

The Illinois Surety Company could be dissolved only in accordance with the laws of Illinois, as construed by the Courts of that State.

The charter granted by the State of Illinois to the Illinois Surety Company created a contractual obligation which could be abrogated only pursuant to the provisions of law of that State existing when the charter was granted.

> *Dartmouth College* v. *Woodward*, 4 Wheat., 518.

Furthermore, the courts of Illinois, in the absence of statutory authority, have no power or jurisdiction to decree dissolution of corporations.

> *Wheeler* v. *Pullman I. & S. Co.*, 143 Ill., 197;
> *Hunt* v. *Legrand*, 143 Ill., 118;
> *Baker* v. *Backus*, 32 Ill., 79.

The construction and effect given by the State courts of Illinois to the statutes relating to the existence of corporations organized under its laws, are, in the absence of Federal questions, binding upon the United States courts.

> *Nesmith* v. *Sheldon*, 7 How., 812, 818;
> *Shelby* v. *Guy*, 11 Wheat., 361;
> *Secombe* v. *Mil. & St. P. Ry. Co.*, 23 Wall, 108;
> *Old Colony Trust Co.* v. *Omaha*, 230 U. S., 100, 116;
> *In re Munger Vehicle Co.*, 159 Fed., 901.

Therefore, the question whether or not the Illinois Surety Company had ceased to exist for all purposes when the judgment secured by the respondent's bond was entered must be determined by the statutes of Illinois, as interpreted by its courts.

We do not question the general doctrine that where the corporate existence has terminated for all purposes, not only do its liabilities end, but all actions pending against it abate, so that no valid judgment may be entered against it. We, however, believe that it is too well established to admit of controversy that the mere formal dissolution of a corporation does not necessarily terminate the corporate existence for all purposes, but that by state law and statute such corporations may still be considered existing thereafter for many purposes, including that of defending suits and having judgments entered against them.

Lessee of Pomeroy v. State Bank, 1 Wall., 23;
Taylor v. *Bowker*, 111 U. S., 110;
Pease v. *Rathbun*, 243 U. S., 273;
Life Assn. of America v. *Fassett*, 102 Ill., 315;
Singer & Talcott v. *Hutchinson*, 176 Ill., 48;
Central Stock & G. Co. v. *Pine Tree Lumber Co.*, 140 Ill. App., 471;
Commercial Trust Co. v. *Mallers*, 242 Ill., 50;
Graham & Morton Trans. Co. v. *Owens*, 165 Ill. App., 100;
Sinnott v. *Hannan*, 214 N. Y., 454.

There are two questions involved, the first of

which is whether there had been in fact any formal dissolution of the Illinois Surety Company, and if so, the second question is whether the effect of such dissolution was to terminate its existence, so that actions pending against it could not be carried to judgment.

The determination of these questions requires an examination of the laws of Illinois prescribing the *method* of dissolution, and the laws of Illinois relating to the *effect* of formal dissolution, and of their construction by its courts.

(A) PROCEDURE FOR DISSOLUTION OF SURETY CORPORATIONS.

The *method* of dissolution applicable to the Illinois Surety Company is prescribed in "An Act in regard to Dissolution of Insurance Companies," which the Surety Company Act, §14, makes applicable.

Under this act proceedings may be initiated under Section 1 by the Auditor of the State, or under Section 2 by a majority of the stockholders.

Except as otherwise provided in the act it is provided that the procedure "shall be the same as in ordinary proceedings in equity" (§9).

The procedure in the Auditor's action is:

1. A petition by the Auditor for an injunction restraining the company from proceeding with its business "until a full hearing can be had." This application may be made either with or without notice in the discretion of the court.

2. "A full hearing of all parties interested."

3. After such hearing a "decree" restraining or prohibiting the further continuance of the business of the company.

4. If the company then "in obedience to the decree" fails to transact business for one year, it is deemed extinct and the Circuit Court on application of the Auditor or any person interested, has authority "to fix by decree the time within which such companies shall close their concerns" (§3).

5. Within two years thereafter the Court may appoint a receiver to wind up the affairs of the corporation "with power to prosecute and defend suits in the name of the corporation" (§5).

The procedure in an action by a majority of the stockholders under Section 2 of the Act is:

1. Petition to the Circuit Court by a majority of the stockholders, stating the grounds of the application.

2. A "hearing" "after due notice to all the parties interested."

3. A "decree" of "dissolution."

4. The appointment of a receiver to wind up the affairs of the corporation "with power to prosecute and defend suits in the name of the corporation" (§5).

(B) EFFECT OF FORMAL DISSOLUTION ON PENDING ACTIONS.

The *effect* of dissolution either by decree in the case of stockholders' action, or by forfeiture for non-user in the case of an Auditor's action, is prescribed in Sections 3 and 4 of "An Act in Regard to the Dissolution of Insurance Companies," and also in Sections 10, 11 and 12 of "An Act concerning Corporations," to the provisions of which surety companies are subject.

Surety Law, Sec. 14.
Evans v. *Illinois Surety Co.*, 298 Ill., 105.

Section 10 of the Corporation Act continues the corporate existence for two years after dissolution for the purpose of collecting debts due the corporation and liquidating its property.

Section 11 provides that such corporations may use their names for such purposes "and shall be capable of prosecuting and defending all suits in law or equity."

Section 12 provides:

> "The dissolution for any cause whatever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liabilities incurred previous to its dissolution."

These provisions have been construed by the Illinois courts to extend the corporate life for an indefinite period after dissolution for the purposes of being sued.

Singer & Talcott v. *Hutchinson*, 176 Ill., 48;
Central Stock & G. Co. v. *Pine Tree Lumber Co.*, 140 Ill. App., 471;
Commercial Trust Co. v. *Mallers*, 242 Ill., 50.

Sections 3 and 4 of the "Act in regard to the dissolution of Insurance Companies" which have not been directly construed by the Illinois courts contain provisions similar to those of Sections 10, 11 and 12 of the Corporation Law, and which we believe to be a mere paraphrase thereof, although the Circuit Court of Appeals held to the contrary.

The Illinois courts have also construed a pro-

vision in an order appointing a receiver after dissolution of a corporation which gave the receiver the right to bring and defend suits in the name of the dissolved company, as having the effect of extending the corporate life after formal dissolution for purposes of such suits and to prevent the abatement of pending actions, even although the receiver did not in fact exercise the power given him.

Life Ass. Assn. of America v. *Fassett*, 102 Ill., 315.

In this last case the Illinois Supreme Court also stated *the general policy* of the State as follows at page 324:

> "From these and other provisions of the statute it clearly appears that it is part of the settled policy of this State, at least so far as domestic corporations are concerned, that upon their dissolution however that may be effected, they shall nevertheless be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts. * * *"

and as the result of this general doctrine it has been held that in the absence of any statute on the subject, an action against an Illinois corporation will not abate upon its dissolution, but that such pending action may be carried to judgment without limitation as to time.

Commercial Trust Co. v. *Mallers*, 242 Ill., 50.

POINT II.

The order in the dissolution action which restrained the Illinois Surety Company from transacting business "until the further order of Court," was not a final decree determining the merits.

(1) The judgment below cannot stand unless it be held, as the Circuit Court of Appeals has done, that this order was the *final decree* upon the merits.

Section 2 of the Insurance Act, upon which the powers of the Court in an action brought by *stockholders* depend, provides that the Court may "after due notice to all the parties interested and for reasonable cause, *decree* a dissolution of the corporation." The decree refered to is obviously a final decree and not merely a temporary restraining order.

The Circuit Court of Appeals has, however, held that dissolution resulted under the terms of Section 3 of the Insurance Act, which provides that charters of corporations which "in obedience *to the decree of any court* * * * shall cease to transact business for one year" shall become extinct.

If this provision has any application to an action by stockholders, it must refer to the final decree, and not to a temporary restraining order whose function is merely to preserve the rights of the parties pending a trial on the merits. If it applied to such a temporary restraining order granted in a dissolution action, it might well happen that owing to congestion of the court's calendar no trial could be had within a year. Yet, nevertheless, the corporation, which might have a per-

fect defense, would become extinct without any opportunity of trying the merits of the action. Such a result is absurd on its face, and if the statute had such an effect, it would presumably be unconstitutional.

(2) The Illinois courts have twice indirectly, and once directly, held that this order is not the final decree of dissolution. After it was made the Attorney General and the Superintendent of Insurance were made parties to the dissolution action and were permitted to file answers.

> *Evans* v. *Ill. Surety Co.*, 201 Ill. App., 578;
> *Evans* v. *Potts*, 204 Ill. App., 212.

In *Evans* v. *Potts, supra,* where this restraining order was before the Court, the appeal from the order permitting the Superintendent of Insurance to intervene was dismissed, the Court saying at page 215:

> "This is not the time to review the order appealed from. Whenever the cause reaches a stage where a final appealable order is entered, then the right of the court to permit the intervening petitioner to become a party will be open to review. * * * It will therefore be the part of wisdom to proceed cautiously in any attempt which may be made to divert the funds or assets of the Surety Company into the hands of the intervenor defendant, for should such action of the court be subsequently deemed improvident and without jurisdiction or right, the receiver paying and the defendant receiving any such funds or assets may, upon review, be compelled to return such diverted funds or assets to the surety company."

In *Evans* v. *Illinois Surety Company*, 298 Ill.,

101, the effect of this order and of the appointment of a receiver was directly involved. It was there claimed by the receiver that the effect was to dissolve the corporation, so that the liabilities provable before the receiver were limited to such as accrued prior to the making of the restraining order. The Supreme Court of Illinois held against this contention, the opinion stating at page 117, as follows:

> "The present action is a suit brought by stockholders, consented to by the company, and but for the fact that the Surety Company was organized under an act which makes it subject to the provisions of the Insurance Dissolution act, it could not be dissolved by a court of chancery at the suit of the stockholders. It is by virtue of section 2 of said act that the court has jurisdiction in the present proceeding to dissolve the Surety Company. *The court has not yet entered such a decree of dissolution and could not enter it on the date when the receiver was appointed.* It could not enter it until after due notice to all the parties interested, which would include all of its creditors and the holders of its obligations and contracts of suretyship, guarantee and indemnity. The court had before it practically but one party, so that the situation that we have is the appointment of a temporary receiver to collect and conserve the assets for the benefit of all the interested parties—not a part of them, but all of them. There has been no decree yet as to who are all the creditors. The court either with or without the consent of the officers of the insolvent corporation, could not terminate existing contracts or in any manner affect the rights and remedies of the creditors and holders of obligations against the company or its property in the hands of the receiver." (Italics ours.)

If these decisions, which we believe to be binding upon this Court, be followed, then the basis of the decision below falls and further consideration of the other points presented herein is unnecessary.

(3) The Supreme Court of Illinois passed upon a similar restraining order made in a dissolution action brought by the Auditor under the Insurance Dissolution Act in *Ward* v. *Farwell*, 97 Ill., 593.

There, as here, the defendant answered, admitting all the allegations of the bill. There, also, a receiver was appointed and an order was made on the bill and answer, restraining the corporation, its officers and agents "*until the further order of the court* from further proceeding with their said business." The Court there held that a statutory receiver could not be appointed until after the entry of a final decree, and said in part at pages 618-619:

> "the Court should, before appointing the receiver, have entered a final order or decree upon the merits, either dissolving the corporation or restraining it from the continuance of its business."

(4) There is nothing in the form of this order or in the record before the Court to distinguish it from similar temporary restraining orders.

The respondent in its answer herein refers to it as a "*preliminary order*" (p. 10). It is referred to in the order appointing the receiver made on the same day as "*the order* restraining and enjoining and forbidding said Illinois Surety Company from further prosecution of its business" (p. 107).

It was made "without bond from the complain-

ants" and the order appointing the receiver, subsequently made, contains the provision: "Said complainants are hereby excused from giving a bond as condition for the appointment of a receiver herein." There would be no object in requiring or waiving the giving of a bond as a condition to the relief if this order were the final decree.

Highland Av. & Belt R. Co. v. Columbian Equipment Co., 168 U. S., 627, at 630.

Finally, although Section 1 of the Insurance Act authorizes *a final decree* in the Auditor's suit, *restraining the corporation from transacting business*, Section 2, under which the majority stockholders brought this proceeding, does not, but provides for a decree of "*dissolution of the corporation.*"

(5) The determination below that an order restraining commission of an act "until the further order of court" is a final decree on the merits, is opposed to determinations of the Federal courts.

Thus, Judge Rogers in the case of *Gas & Electric S. Co.* v. *Manhattan & Queens Trac. Corp.*, 266 Fed., 625, at page 632, said:

> "An interlocutory order is one entered between the commencement and the end of a suit or action which determines some point or matter, but which is not a final decision of the matter in issue. Bouvier Law Dictionary. An interlocutory injunction is one granted prior to the final hearing and determination of the matter in issue which is to continue until answer or until the final hearing or *until the further order of the Court.*"

In *Bissell Carpet Sweeper Co.* v. *Goshen Sweeper Co.*, 72 Fed., 545 at 554, it was said:

> "A preliminary order by which no question is determined upon the merits, and no right established, is termed a 'decretal order' in distinction to an interlocutory decree by which something touching the merits is adjudged. Such an order was seldom regarded as subject to appeal. 2 Daniell, Ch. Pl. & Prac. (Orig. Ed.) 637."

In the order appointing the receiver subsequently made jurisdiction is expressly retained "*until final hearing and settlement thereafter* of all unfinished business of said Illinois Surety Company and the receivership herein."

(6) Judge Rogers in his opinion says (p. 124):

> "This court has before decided that a decree does not lose its character as a final decree by adding the words 'until the further order' of the court. That question was settled for fifty years in the Federal Courts by the decision of the Supreme Court in *French* v. *Shoemaker*, 12 Wall, 86, 98."

The decree in *French* v. *Shoemaker* did not, however, contain the words "until the further order of the court," but merely granted leave to make application at the foot of the decree for further order to carry it into effect. The decree there was final as to all matters covered by the adjudication. If we assume that a perpetual injunction against transaction of business is the equivalent of a decree of dissolution, nevertheless the order in question is not perpetual, it merely *suspends* the transaction until some further action is taken to make it perpetual. It is provisional and tentative, not final; by its express terms the injunction is terminable by the court and subject to reconsideration, modification, or reversal at any

time, without any requirement for a petition for rehearing or review.

French v. *Shoemaker*, was decided on the authority of *Forgay* v. *Conrad*, 6 How., 201, in which Justice Taney points out the distinction between a decree which finally determines the matters in issue, but reserves other matters, supplemental thereto and relating to the relief, for further action, from an order such as that under consideration, which is merely suspensive in its effect. He says at page 204:

> "And according to the last paragraph in the decree the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects the whole of the matters brought into controversy are finally disposed of as to all the defendants, and the bill as to them is no longer pending before the court, *and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided except upon a petition for rehearing.*"

(7) The Circuit Court of Appeals appears to be in error in its conclusion that the order in question determined the merits in the dissolution action. There were two issues presented by the bill. One involved a question of fact whether or not the Illinois Surety Company was insolvent. The order in question recites that the court was satisfied that "the averments in said bill and petition are true" and for purposes of the order that issue of fact was determined.

The other issue was whether under Section 2 of the Insurance Act this insolvency presented "reasonable cause" for a dissolution (*Tenabo Mining & Smelting Co.* v. *Bates*, 220 Fed., 756). Insolvency in itself is not a sufficient cause for dissolution.

Wheeler v. *Pullman I. & S. Co.*, 143 Ill., 197.

Insolvency is a malady curable by the injection of new capital, and as Section 2 of the Insurance Act authorizes a decree of dissolution only "after due notice to all the parties interested," the Court could not well have determined that such "reasonable cause" existed until notice had been given to the minority stockholders who might have been willing to remedy this financial disorder.

14A *Corpus Juris*, 1142;
Evans v. *Ill. Surety Co.*, 298 Ill., 101, at 117;
Watson v. *U. S. Refining Co.*, 68 Fed., 769, 773.
Baker v. *Backus*, 32 Ill., 79, 96.

Furthermore, the decree could not properly be made until after notice to the superintendent of Insurance and the Auditor of the State, also "parties interested" and who were subsequently made parties defendant.

POINT III.

The Circuit Court erred in its determination that Sections 10, 11 and 12 of the General Corporation Law of Illinois do not apply to surety companies.

These provisions preserve the corporate life after dissolution for an indefinite period for purposes of being sued.

The Surety Company Act, by Section 14, provides:

"Corporations organized under this act shall

> be subject to all laws of this state governing corporations for pecuniary profit, as provided for in an act entitled 'An Act Concerning Corporations,' approved April 12, 1872, in force July 1, 1872, and amendments thereto in force July 1, 1897, and the duties thereof, and shall have the powers thereof so far as the same are not inconsistent with the provisions of this act. * * *"

Section 10 of "An Act Concerning Corporations" provides for an extension of two years after dissolution

> "for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof."

Section 11 provides:

> "Such corporations shall use their respective names for the purposes aforesaid, and shall be capable of prosecuting and defending all suits in law or in equity."

Section 12 provides:

> "The dissolution for any cause whatever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liabilities incurred prior to its dissolution."

The effect of these provisions has been stated in *Singer & Talcott* v. *Hutchinson*, 176 Ill., 48, at page 52, as follows:

> "It is evident that Sections 10 and 11 were enacted for the benefit of the corporation, but fixing a limitation upon the term of its continued existence for the sole purposes expressed, while Section 12 was enacted for the benefit of those whose rights had accrued

against the corporation previous to its dissolution, without any limitation as to time other than the general Statute of Limitations applicable. * * *

"While the corporate capacity of this corporation was continued for two years after the expiration of its charter * * * in order *to bring suits* for the purpose aforesaid, its corporate capacity *to be sued* as a party defendant for liabilities which accrued before its dissolution, was continued without limitation as to time, and therefore the general Statute of Limitations only would apply."

See, also:

Life Assn. of America v. *Fassett*, 102 Ill., 315;

Commercial Trust Co. v. *Mallers*, 242 Ill., 50;

Central Stock & G. Co. v. *Pine Tree Lumber Co.*, 140 Ill. App., 471;

Graham & Morton Trans. Co. v. *Owens*, 165 Ill. App., 100.

Accordingly, if the restraining order had actually been a decree of dissolution, these provisions of the General Corporation Law would have continued the corporate life for purposes of pending suits, so that the action against the Illinois Surety Company would not have abated. The learned Circuit Court of Appeals, in its opinion herein, referred to *Singer & Talcott* v. *Hutchinson*, and says (Record, p. 125):

"If the Illinois Surety Company had been subject to the General Corporation Law of the State instead of the Insurance Law of 1874, there might be ground for the contention that the judgment which Mackey obtained in New York after the two-year period

had expired, was binding upon the Illinois corporation, but if, as we hold it was, the corporation was subject to the Act of 1874 in regard to the dissolution of Insurance Companies, then it was not subject to the General Corporation Law of the State or to the public policy of the State as announced in the two decisions last quoted."

This ignores the language of the Surety Company Law, which we have quoted above, and since the opinion below was written the Supreme Court of Illinois, in *Evans* v. *Illinois Surety Co.*, 298 Ill., 101, has passed on this very question.

Its opinion quotes from Sections 10 and 12 of the General Corporation Act, and says at page 106:

> "It is argued by counsel for appellant that the provisions of the act regarding corporations for pecuniary profit cannot be applied to a surety company because it is an insurance company."

After discussion it reaches this conclusion (p. 107):

> "As already stated, the present Surety act under which this surety company was organized, became the law in 1899, and the general Incorporation act regarding corporations for pecuniary profit was passed in 1872. The legislature without question by the latter act intended to incorporate the provisions of the Incorporation act of 1872 into and as a part of the provisions of the Surety act of 1899, and under the decisions of this court, there can be no question but that the provisions of the general Incorporation act heretofore quoted, and all its other applicable provisions, apply to corporations organized under the Surety act, and this court in decisions already rendered has assumed that the provisions of the

> general Incorporation act in this regard apply to insurance companies."

In view of this decision it becomes unnecessary to discuss the question whether the provisions in Sections 3 and 4 of the Insurance Act have the same effect as Sections 10, 11 and 12 of the General Corporation Law. We believe, however, that in view of the general policy of the State of Illinois, as expressed by its courts, that these provisions, which also apply to surety companies, were intended to and would be held by the courts of the State to be mere paraphrases and of the same effect.

POINT IV.

The Circuit Court of Appeals' determination that a mere non-user for a period of one year results in dissolution without further action of the Court, is in conflict with the decisions of the State Courts and of the Federal Courts.

The Circuit Court of Appeals has held that the corporate life came to an end at the expiration of one year from the date of the restraining order by reason of the failure of the company to transact business during this year, under the provisions of Section 3 of the Insurance Dissolution Act. That section, however, while it provides that in such case the charter shall be "deemed extinct," contains the following additional provision:

> "and the circuit court shall have authority upon application by the petition of the Auditor of State or any other person interested to fix by decree the time within which such companies shall close their concerns."

This provision assumes that the expiration of one year does not automatically terminate the corporate existence, but that until some time has been fixed by decree, such corporations continue bodies corporate with power to and for the purpose of closing their concerns. The power to "close their concerns" extends the corporate life for purposes of bringing and defending suits.

Dundee M. T. Co. v. *Hughes*, 89 Fed., 182;
Lessee of Pomeroy v. *State Bank*, 1 Wall, 23;
Board of Councilmen v. *Deposit Bank*, 124 Fed., 19;
Stark Electric R. Co. v. *M'Ginty Contr. Co.*, 238 Fed., 657;
In Re Munger Vehicle Tire Co., 159 Fed., 901;
U. S. Gypsum Co. v. *Hoxie*, 172 Fed., 504.

The forfeiture of the charter in such case until determined by decree of court is available only to the State.

10 Cyc. of Law and Prac., 1275;
Lessee of Frost v. *Frostberg Coal Co.*, 24 How., 278;
Bank of Bethel v. *Pahquiquoque Bk.*, 14 Wall., 383;
People v. *Rose*, 207 Ill., 352;
Baker v. *Backus*, 32 Ill, 79, 97, 110;
Thompson v. *Candor*, 60 Ill., 244;
Thomas v. *So. Side El. R. Co.*, 218 Ill., 571;
Gilmer Creamery v. *Quentin*, 142 Ill. App., 448;
Matter of N. Y. & L. I. Bridge Co., 148 N. Y., 540;

Wallamet Falls Canal &c. Co. v. *Kittredge*, Fed. Cas. No. 17, 105;
Briggs v. *Cape Cod Canal &c. Co.*, 137 Mass., 71;
N. Y. & N. E. R. R. Co. v. *N. Y. N. H. & H. R. R. Co.*, 52 Conn., 274;
La Grange, &c. R. R. Co. v. *Rainey*, 7 Cold (Tenn.) 432;
Shand v. *Gage*, 9 S. C., 187;
Ahrends v. *State Bank*, 3 S. C., 401;
Atchafalaya Bk. v. *Dawson*, 13 La., 497 (1839);
Lumber Co. v. *Ward*, 30 W. Va., 43;
Galveston &c. R. R. Co. v. *State*, 81 Tex., 596;
Blackstone's Commentaries, Vol. 1, page 485;
Kent's Commentaries, Vol. 2, page 305;
Cook on Corporations, §637;
Morawetz on Corporations, Vol. 2, §1015.

POINT V.

The Circuit Court of Appeals' determination that the appointment of a receiver with power to prosecute and defend actions in the name of the Illinois Surety Company, and his entering into the defense of the attachment action, did not prevent its abatement, conflicts with the decisions of the State Courts and of the Federal Courts.

The receiver by the order of his appointment was given express authority to "defend suits in the name of the Illinois Surety Company * * *, to appoint * * * attorneys to prosecute and

defend suits" (p. 108). He did employ attorneys to defend the attachment action and they were paid by order of the Illinois Court (pp. 89, 91).

In order to obviate the very objection that has been taken in this action, a record was made in the attachment action that the receiver was defending the action (pp. 40, 41). Since under the order appointing him he had power to defend the action either in his own name or the name of the Illinois Surety Company, he thus became a party to the action, and it was neither possible nor feasible to make him a party in any other way.

It has been held by the Illinois Courts that the appointment of a receiver of a dissolved corporation, with power to defend suits in the name of the corporation, extends the corporate life and prevents abatement of pending actions, even although the receiver does not appear in or defend the action.

> *Life Assn. of America* v. *Fassett*, 102 Ill., 315, 328-329.

Similar powers given to trustees and receivers of dissolved corporations have been held to continue the corporate life for purposes of pending actions and to prevent abatement as the result of a formal dissolution.

> *Pease* v. *Rathbun*, 243 U. S., 273;
> *Taylor* v. *Bowker*, 111 U. S., 110;
> *White Mountain P. Co.* v. *Morse*, 127 Fed., 643;
> *Met. Rubber Co.* v. *Place*, 147 Fed., 90;
> *Sinnot* v. *Hannon*, 214 N. Y., 454;
> *Chemical Nat'l Bk.* v. *Hartford Safe Dep't. Co.*, 161 U. S., 1, 7.

This Court said in *Pease* v. *Rathbun, supra,* at page 277:

> "It is contended that all suits pending against the People's Light Company abated upon its dissolution. As we read the Texas statute, * * * such a consequence is carefully avoided. It is there provided that upon dissolution the President and directors shall be trustees of the creditors and stockholders of the corporation 'with full power to settle its affairs,' and with full power 'in the name of such corporation * * * to collect all debts, compromise controversies, maintain or defend judicial proceedings.' This general language makes no distinction between pending and subsequent 'judicial proceedings' which the trustees are empowered to maintain and defend in the corporation's name, and there seems no reason why such distinction should be read into the statute."

This question is peculiarly important, since in nearly every instance where a corporation is formally dissolved, either by statute or by decree of court, trustees or receivers are appointed with power to prosecute and defend actions in the name of the corporation. If, despite such appointment, pending actions nevertheless abate, or can be caused to abate by the refusal of the receiver or trustee to continue their defense, the question should at least be authoritatively determined by this Court. The hardship of such a rule is demonstrated in the present case. The very purpose of the bond in suit was to secure the plaintiff against insolvency of the Illinois Surety Company. If the other questions involved were correctly decided by the Circuit Court, and if in the absence of the appointment of such a re-

ceiver, all actions abated on the expiration of the two years' period, the appointment of the receiver with power to defend, and his entering into the defense of this action has enabled him to delay final judgment until the expiration of the period, and, under the decision below, to nullify the security given and discharge the bondsman from the liability which it was paid to assume.

POINT VI.

The judgment below should be reversed with direction that judgment be entered in favor of the petitioner.

We believe that we have demonstrated in the foregoing points that the Courts below erred in their determination, and that the judgment below should be reversed, not only because the decision is erroneous, but because in addition, it is a decision which conflicts with those of the Supreme Court of Illinois, and also with decisions of this Court, and of other Circuit Courts of Appeals and State Courts.

While many of the questions involved relate to a construction of the Statutes of Illinois, practically every State in the Union has similar statutes, and the construction involves questions of substantive law which are of general importance.

The determination of the Circuit Court of Appeals that an order granting relief "until further order of the court," is a final decree, if erroneous, is most unfortunate, since the question of what is and what is not a final decree constantly arises and vitally affects both the right of appeal and the necessity of either appealing or petitioning for a

rehearing within a limited period of time. The decision if sustained, destroys one of the tests heretofore applied, which is, that an order or decree is not final where it may be changed at any time without resort to petition for rehearing, writ of error, or appeal. No litigant can feel safe in submitting to a temporary restraining order made after a hearing without testing its nature by appeal within the time limited by statute.

All of which is respectfully submitted.

October Term, 1922.

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APPENDIX.

Laws of Illinois.

(The first section number is Hurd's, the second is that of the original act.)

Extracts from "An Act concerning Corporations," approved April 12, 1872, in force July 1, 1872, as amended:

Hurd's Rev. St., Chap. 32.

"10. *Continued after expiration of Charter.*—§10. All corporations organized under this law whose powers may have expired by limitation or otherwise, shall continue their corporate capacity during the term of two years, for the purpose only of collecting the debts due said corporation, and selling and conveying the property and effects thereof.

"11. *Rights after expiration of Charter.*—§11. Such corporations shall use their respective names for the purposes aforesaid, and shall be capable of prosecuting and defending all suits in law or equity.

"12.—*Remedies saved.*—§12. The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

Extract from "An Act to Provide for the Organization, Management and Regulation of Surety Companies," Laws of 1899, page 270:

Hurd's Rev. St., Chap. 32.

"102s. *What law subject to.*—§14. Corporations organized under this act shall be subject to all laws of this State governing corporations for pecuniary profit as provided for

in an act entitled, 'An Act concerning corporations,' approved April 12, 1872, in force July 1, 1872, and amendments thereto, in force July 1, 1897, and the duties thereof, and shall have the powers thereof so far as the same are not inconsistent with the provisions of this act. Such companies shall also be subject to the provisions and requirements of an act entitled, 'An Act in regard to the dissolution of Insurance Companies,' approved February 17, 1874, in force July 1, 1874."

Extracts from "An Act with regard to the Dissolution of Insurance Companies," approved February 17, 1874, in force July 1, 1874:

Hurd's Rev. St., Chap. 72.

"11. *Involuntary dissolution.*—§1. Be it *enacted by the People of the State of Illinois, represented in the General Assembly.* That if the auditor of State, upon examination of any insurance company, incorporated in this state, is of the opinion that it is insolvent, or that its condition is such as to render its further continuance in business, hazardous to the insured therein, or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded, or is exceeding its corporate powers, he shall apply by petition to a judge of any circuit court of this state to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business, until a full hearing can be had, or otherwise as he may direct. It shall be discretionary with such judge either to issue said injunction forthwith, or to grant an order for such company, upon such notice as he may prescribe, to show cause why said injunction should not issue, or to cause a hearing to be had on complaint and answer, or otherwise,

as in ordinary proceedings in equity, before determining whether an injunction shall be issued. He may in all such cases make such orders and decrees, from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company.

"12. *Voluntary dissolution.*—§2. When a majority, in number or interest, of the members or stockholders of any insurance company incorporated in this state, desire to close its concerns, they may apply by petition to the circuit court of the circuit in which the company is located, setting forth in substance, the grounds of their application; and the Court, *after due notice to all the parties interested, may proceed to hear* the matter, and for *reasonable cause decree a dissolution* of the corporation; and corporations so dissolved shall be deemed and held extinct in all respects as if their charters had expired by their own limitation, subject, however, to the provisions hereinafter prescribed. (Italics ours.)

"13. *When charters extinct.*—§3. The charters of all insurance companies incorporated in this state, which either from neglect or by vote of their members or officers, or in *obedience to the decree of any court, have ceased,* or shall hereafter cease, for the period of one year, to transact the business for which they were organized, shall be deemed and held extinct in all respects, as if they had expired by their own limitation; *and the circuit court shall have authority, upon application, by the petition of the auditor of state, or of any person interested, to fix, by decree, the time within which such companies shall close*

their concerns; Provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors. (Italics ours.)

"14. *Continued as to creditors, etc.*—§4. Insurance companies whose charters expire by their own limitation, or become forfeited by non-user or are dissolved by decree of court, or otherwise, shall, nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized.

"15. *Appointment of Receiver.—His powers.*—§5. When the charter of any such insurance company expires, is forfeited or annulled, or the corporation is restrained from further prosecution of its business, or is dissolved, as hereinbefore provided, the Court, on application of the auditor, or of a member, stockholder or creditor, may, at any time before the expiration of said two years, appoint one or more persons to be receivers, to take charge of the estate and effects of the company, including such securities as may be deposited with the auditor or treasurer of the state, and to collect the debts due, and property belonging to it, *with power to prosecute and defend suits in the name of the corporation*, or in their own name, to appoint agents under them, and do all other acts necessary for the collection, marshaling and distributing of the assets of the company and the closing of its concerns; and when necessary for the final settlement of its unfinished business, the powers of such receivers may be continued

as long as the Court deems necessary therefor. (Italics ours.)

"16.—*Duties of Receiver.*—§6. The receiver shall pay all debts due from the company, if the funds in his hands are sufficient therefor, and if not, he shall distribute the same ratably among the creditors who prove their debts, in such manner as the Court may direct, and receivers may be authorized by the Court to sell, convey and dispose of, and convert into money, any of the securities or assets of the company, for the purpose of paying such debts, and distributing such funds. If there is a balance remaining after the payment of the debts, the receiver shall distribute the same among those who are justly entitled thereto, as members, stockholders, or otherwise, or their legal representatives.

"17. • • •

"18. • • •

"19. *Practice.*—§9. The mode of summoning parties into court, the rules of practice, course of procedure, and powers of Courts in cases arising under this act, shall be the same as in ordinary proceedings in equity in this state, except as herein otherwise provided."

Appeal Printing Co., 22 Thames St., N. Y. City

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Supreme Court of the United States

OCTOBER TERM, 1922.

NUMBER 92.

JOHN EWEN,
Petitioner,

against

AMERICAN FIDELITY COMPANY,
Respondent,

BRIEF FOR RESPONDENT, DEFENDANT BELOW.

Writ of certiorari by plaintiff to review an order of the Circuit Court of Appeals for the Second Circuit, which unanimously affirmed a judgment for defendant entered in the United States District Court for the Southern District of New York, in an action at law, after trial before the court and a stipulated jury of one (fols. 214, 38, 36).

Since the facts were tried by the court by consent, the judgment stands in the same position as to questions of fact as if it were entered on a verdict for defendant (fol. 38). It was, moreover, stipulated that the case be tried before the court and a jury of one with the same force and effect as if there were twelve jurors (fol. 67).

Nature of Action and Issues.

The action is on an undertaking in the amount of $7500 given to discharge an attachment in the State Court.

Plaintiff's assignor, one Mackey, sued the Illinois Surety Company in the New York Supreme Court of Kings County, and obtained an attachment. The defendant in the present action gave the undertaking sued on to discharge said attachment. Said undertaking was not put in evidence by plaintiff, but defendant admitted, by not denying the allegations of paragraph "Second" of the complaint, that defendant on July 9, 1915, delivered pursuant to statute its undertaking for the purpose of obtaining the discharge of said attachment, whereby it undertook that "defendant *Illinois Surety Company would on demand pay* to the plaintiff David Clinton Mackey the amount of *any judgment that might be recovered* therein against the defendant not exceeding $7500 with interest" (fols. 3, 18). Said undertaking was given pursuant to the New York Code of Civil Procedure, Section 688, now Section 953 of the Civil Practice Act.

In dissolution proceedings brought against it in the State of Illinois, the Illinois Surety Company was, on April 19, 1916, duly "restrained, enjoined and forbidden" from further prosecution of its business (fols. 181, 180). Thereafter on the same day a receiver was appointed to liquidate its assets, who was never made a party defendant in said action brought by Mackey (fols. 182-183). This restraint and stoppage of business by court order has since continued (fol. 143).

By the statutory system in Illinois for the dissolution and liquidation of insurance corporations, this stoppage of business in obedience to court order caused the charter of the corporation to expire by its own limitation at the end of one year, *i. e.*, on April 19, 1917; and caused the corporation to cease to exist for the purpose of prosecuting and defending actions two years from April 19, 1917, *i. e.*, on April 19, 1919. These statutes of Illinois will be set forth later.

On the expiration of this period of three years from April 19, 1916, to wit, on April 18, 1919, the Illinois court by order directed the receiver "to discontinue any further defense" of the corporation in said action brought by Mackey, and ordered that Mackey file his claim before the Master in Chancery in said liquidation proceedings (fols. 192, 191).

The receiver of the Illinois Surety Company then served said order of April 18, 1919, on Mackey as directed by said order, with notice of where Mackey might file his claim with the Master in Chancery to whom contested claims had been referred (Ex. A, fols. 165, 192, 189). Then the attorneys in New York who had appeared for the Illinois Surety Company in said action notified Mackey's attorneys that their authority to appear for said company had been wholly withdrawn (fols. 54-55).

Mackey had been the agent of the Illinois Surety Company in New York, and his agency had been terminated, and he and the company were making enormous claims against each other, and the company had Mackey indicted for converting its property and securities to his own use (fols. 38-39).

Said action brought by Mackey was apparently a back-fire against the claims of the Illinois Surety Company against him. The Illinois Surety Company counterclaimed in said action for $153,914.56 (fol. 109). Said indictment was dismissed and Mackey delayed his aforesaid action and did not seriously prosecute the same until he learned from the order of the Illinois court of April 18, 1919, that no further defense of the corporation would be made (fols. 191-192, 165, 57). He then moved at once, on May 1, 1919, to have a new referee appointed to try his said action, and, no one appearing for the Illinois Surety Company, he obtained the appointment of a referee, and a referee's report on which he entered judgment for himself for $37,041.95, and dismissing the counterclaims of the Illinois Surety Company in said action amounting to $153,914.56 for property converted and premiums received by Mackey and not accounted for (fols. 129, 109). In Mackey's amended and supplemental complaint in said action he had demanded judgment for only $23,000 (fol. 97).

The judgment roll in Mackey's action against the Illinois Surety Company was put in evidence in the present action, but the petitioner did not put into the record the minutes of Mackey's testimony before the referee, which are referred to in the referee's report on which said judgment was entered (fols. 123-124). The reason is, as may be inferred, that said testimony of Mackey, the only witness, was wholly insufficient and laid no proper foundation for said report.

Defendant contends, and both the lower Courts have found, that Mackey did not duly recover any judgment against the Illinois Surety Company be-

cause that company ceased to exist for the purpose of defending actions, and the appearance for it had been wholly withdrawn, before said judgment was recovered. Also that the claim of Mackey was delayed and never pressed as a live claim, until the Illinois Surety Company had ceased to exist, and the Illinois court had ordered that no further defense of it be made, and that Mackey file his claim with the Master in Chancery in the Illinois proceeding. The defendant herein never undertook against any judgment that might be entered against the Illinois Surety Company after it had ceased to exist, and to hold the defendant upon said judgment would amount to a gross fraud upon it.

Statement of Facts.

Filing of Defendant's Undertaking.

Plaintiff's assignor, Mackey, began the action against the Illinois Surety Company, in which the undertaking sued on was filed, on May 21, 1915 (fol. 82). The undertaking was filed on July 9, 1915 (fol. 4). The attachment was vacated on July 10, 1915 (fol. 4).

Organization of Illinois Surety Company.

The corporation was organized in 1905 in Illinois, where its main office was. It was a surety corporation, a kind of insurance company (fols. 66, 167-168). It did an active business in thirty-two states and districts and had deposits with superintendents of insurance in various states (fols. 170-171).

The statute under which it was organized is "An Act to provide for the organization, management and regulation of surety companies," in force April 17, 1899. This statute (Section 14) provides that such companies shall be subject to the provisions of "An Act in regard to the dissolution of insurance companies," in force July 1, 1874. These statutes will be considered later. The trial court took judicial notice of the statutes of Illinois by consent of the parties (fol. 60).

DISSOLUTION OF ILLINOIS SURETY COMPANY.

On April 19, 1916, a majority in number and interest of the stockholders of the Illinois Surety Company filed a bill in the Superior Court of Cook County, Illinois,

> "to *close said company* and to procure a decree of dissolution of the corporation, in the manner provided by law" (Ex. B-1, fol. 168).

It was expressly stated by the attorney for plaintiff that there was no objection as to the form of this proof (fol. 58). The stockholders' bill shows as follows: That the corporation had enumerated assets in all states amounting to around $940,000, and that there were claims pending against it of about $1,000,000, and that it had outstanding policies amounting to about $72,000,000. That its capital and surplus had become impaired and the corporation was insolvent (fols. 173, 170-171).

That it had been made insolvent (1) by reason of the fact that its agent in New York City, D. C. Mackey (plaintiff's assignor), had been not only a reckless underwriter but also had been dishonest

in that he had issued a large number of bonds which he had not reported to the company and the company had suffered large losses thereon; also (2) by reason of the fact that the company had bonded the La Salle Street Trust & Savings Bank of Chicago which had failed (fol. 171).

That the property of the company was subject to attachment by creditors, and that unless a receiver should be appointed the corporation would be subjected to a multiplicity of suits in various states, and its assets greatly depleted and unequally distributed to creditors (fols. 173-174). The stockholders asked that the

> "Illinois Surety Company may be restrained by proper decree * * * from further prosecution of its business, and that * * * a receiver be appointed forthwith, * * * to take charge of the estate and effects of said corporation, including all such securities as are deposited in this and other states, to collect the debts due and the property belonging to said corporation with power to prosecute and defend suits in the name of said corporation or in the name of said receiver, and to do all other acts necessary to the collection, marshalling, and distribution of the assets of said Illinois Surety Company and the closing of its concerns" (fol. 174).

On the same day, April 19, 1916, the Illinois Surety Company filed its answer to said bill, admitting all the allegations thereof (fols. 179-180).

On the same day, April 19, 1916, oral testimony was taken in the Superior Court of Cook County, Illinois, which found that the averments of said bill were true, and made a decree:

> "1. That the said Illinois Surety Company be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business" (fols. 181, 180).

On the same day, April 19, 1916, the Superior Court of Cook County made a separate order appointing a receiver of all the property of the corporation or held for its account wherever situated (Ex. B-4, pp. 107-108).

The receiver was expressly given

> "power to prosecute and defend suits in the name of the Illinois Surety Company, or in his own name" (fol. 184).

The receiver took possession at once of all the property of the corporation and, under the supervision of said court, had been collecting and liquidating the assets to the time of the trial herein (fols. 143-144).

Statutory System in Illinois for Winding Up and Liquidating Insolvent Insurance Corporations.

The procedure in Illinois for winding up an insolvent surety corporation consists of the following steps (the statutes will be referred to immediately hereafter):

1. An injunction is issued restraining the corporation from doing business and a receiver is then appointed by a separate order.

2. By express statutory provision the charter of the corporation *expires by limitation* one year from the date of said injunction.

3. The statute provides that after the expiration of this one year, the corporation shall be continued for *two years* for the *purpose of prosecuting and defending suits.*

4. After the expiration of this two-year period the corporation is defunct for all purposes and no judgment can be entered against it.

The judgment which is the subject of the present action was entered against the Illinois Surety Company after the expiration of the full three-year period from the date when it ceased to do business in obedience to the decree of the Illinois court, and, therefore, after the corporation became defunct for all purposes.

Said judgment was entered after the Illinois court had ordered that no further defense of the corporation be made (fol. 192). This order was made pursuant to said statutory system of dissolving insurance corporations, and is based on the law that no judgment that would be valid in either New York or Illinois *could* be entered against the corporation after it had ceased to exist for that purpose.

Statute of Illinois for Dissolution of Insurance Corporations.

The Illinois statute entitled "An Act in regard to the dissolution of insurance companies," which took effect on July 1, 1874, was in force at all times material herein (Hurd's Rev. Stat. of Ill., 1917, Part 2, Ch. 73, pp. 1679-1680).

Section 1 of said Act provides for involuntary dissolution by petition of the auditor of state in case of insolvency.

Section 2 thereof provides for voluntary dissolution by petition of two-thirds of the stockholders, "subject, however, to the provisions hereinafter prescribed." Then follows:

> "§ 3. The *charters of* all *insurance companies* incorporated in this state, *which* either from neglect or by vote of their members or officers, or *in obedience to the decree of any court, have ceased* or shall hereafter cease, *for the period of one year, to transact* the *business* for which they were organized, *shall be deemed and held extinct in all respects, as if they had expired by their own limitation;* and the circuit court shall have authority, upon application, by the petition of the auditor of state, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns; provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors.
>
> "§ 4. *Insurance companies whose charters expire by their own limitation, or become forfeited by non-user,* or are dissolved by decree of court, or otherwise, *shall,* nevertheless, *be continued bodies corporate for the term of two years after such expiration,* forfeiture or dissolution, *for the purpose of prosecuting and defending suits* by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized."

Section 5 provides that when the corporation has been "restrained from further prosecuting its busi-

ness," the court may appoint "one or more persons to be receivers" of the property "with power to prosecute and defend suits in the name of the corporation, or in their own names, * * * and do all other acts necessary for the collection, marshaling and distributing all the assets of the company."

In the opinion of the learned trial court said Section 4 is referred to as Section 14, the court following the numbers of Hurd's Rev. Stat. (fol. 73).

Steps Taken in Mackey v. Illinois Surety Company.

Mackey brought two actions in the Supreme Court of Kings County, New York, both to recover an alleged balance of commissions claimed to be due for services in acting as agent of the Illinois Surety Company to obtain applications for bonds, and to issue the bonds, and collect the premiums (fols. 44, 38). The action in which the undertaking of defendant herein was filed was the second of said actions. It was begun on May 11, 1915 (fols. 76, 44).

Action Delayed Until Corporation Was Dissolved and Appearance for it Withdrawn.

The original complaint in Mackey's said action number 2 alleged that $7,498.02 was due for commissions on account of bonds executed (fol. 81). Issue was joined on July 6, 1915, and the case was noticed for trial for October 4, 1915 (fols. 50, 85). It was duly reached on the day calendar for trial on October 6, 1916, and was adjourned by plaintiff from time to time until December, 1916, when plaintiff had it marked "reserved generally" (fols.

51-52). Plaintiff then could have had it restored for trial at any time on five days' notice (fol. 52), but he allowed it to remain neglected on the "reserved generally" calendar until November, 1917 (fol. 53).

Then on November 21, 1917, an order was entered allowing plaintiff to amend his complaint (fol. 89). The amended complaint raised the amount of damages claimed from $7,498.02 to $23,000 (fol. 97). The answer of the Illinois Surety Company to the amended complaint is a general denial that any amount was due, and a counterclaim for $153,914.56, of which $87,235.96 was for moneys and securities converted by Mackey (fols. 109, 108). Mackey's reply to these counterclaims is dated January 15, 1918, and is a general denial (fol. 116).

The action was referred to Mr. Larremore to hear and determine by order of November 21, 1917 (fol. 89). Mr. Larremore died in August, 1918, the case not having been determined (fol. 53).

After the death of Mr. Larremore in August, 1918, plaintiff took no legal step until after the order of the Illinois court of April 18, 1919, directing that no further defense of the Illinois Surety Company be made in said actions brought by Mackey (fols. 53, 57, 192, 130).

New Reference Obtained After Dissolution of Illinois Surety Company and Without Appearance For It.

The order of the Illinois court directing the receiver to make no further defense of the Illinois Surety Company in said action was dated and entered on April 18, 1919. It directs the receiver to

notify Mackey of said order (fols. 191-192). The receiver immediately caused said order to be served upon Mackey (Ex. A, fols. 166, 57). Mackey then at once made a motion for the appointment of a new referee, said motion being returnable on May 1, 1919 (fol. 130).

On April 29, 1919, before said motion was returnable, the attorneys who had appeared for the Illinois Surety Company, and whose appearance had been revoked when the Illinois court directed the receiver to make no further defense in the action, served on the attorneys for Mackey the following notice:

> "You will please take notice that the authority of the undersigned to represent the defendant in the above entitled action and to accept service of papers therein on its behalf, and to appear for it therein, has been terminated and revoked, and that we are no longer authorized to accept service or to appear as attorneys for the defendant in this action" (fol. 54).

The original of said notice with proof of service thereof on the attorneys for Mackey was filed in the County Clerk's office with the papers in the action (fol. 54). After said order of April 18, 1919, no one ever appeared for the defendant in the action.

Then, there being no appearance for the Illinois Surety Company, Mackey obtained by default an order dated May 1, 1919, referring said action number 2 to a new referee (fols. 55, 118).

Likewise, without any appearance for the Illinois Surety Company, he obtained a report from

the referee and caused to be entered a judgment for $37,041.95 (fols. 55, 123, 129) on a complaint that demanded only $23,000 (fol. 97). Said referee's report and said judgment recited that the defendant did not appear (fols. 123, 128). The testimony previously taken was not used on this new reference (fol. 123). The minutes of the testimony of Mackey, the only witness before the new referee, were filed with the judgment roll, but were not offered by the plaintiff herein in support of said judgment for the obvious reason that they would not be helpful to the plaintiff's case, said testimony being entirely insufficient and being no proper basis for the judgment rendered.

The demise and dissolution of the Illinois Surety Company took place on April 18, 1919, pursuant to the law of its incorporation, to which it was at all times subject. There was no reviver of the action and no suggestion of an appearance for either it or the receiver after the corporation became defunct on April 19, 1919. Said judgment, which is the basis of the present action, is void, and was entered without jurisdiction over the Illinois Surety Company, which had ceased to exist under the Illinois decree and statute when the order of reference and judgment were made.

POINTS.

I.

The Illinois Surety Company ceased to exist for the purpose of defending suits on April 19, 1919.

The act under which it was incorporated expressly provides that it—a kind of insurance corporation—should be "subject to the provisions and requirements of an act entitled, 'An Act in regard to the dissolution of insurance companies,' approved February 17, 1874, in force July 1, 1874" (Hurd's Rev. Stat., 1917, Part 1, p. 741, Sec. 14). So, as respects its dissolution, it was expressly and emphatically subject to said act in force July 1, 1874, regarding the dissolution of insurance companies.

Said act expressly provides for dissolution of insurance corporations by a decree restraining them from doing business, coupled with a lapse of time which in one year causes the charter to expire by its own limitation, and, two years thereafter, causes the corporation to cease to exist for the purpose of defending suits. Section 3 of said act (above quoted in full) provides that the charters of all insurance companies

> "shall be deemed and held extinct in all respects, as if they had expired by their own limitation,"

when they

> "in obedience to the decree of any court, have ceased * * * for the period of one year, to transact the business for which they were organized."

Section 4 is the complement to Section 3. It provides that insurance companies whose charters expire by their own limitation, or by non-user, or are dissolved by decree or otherwise,

> "shall, nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them."

On April 19, 1916, the Illinois Surety Company was restrained by decree from further prosecution of its business, and hence its charter expired by its own limitation on April 19, 1917 (fol. 181). It was continued a body corporate by statute for two years and no more after its charter expired, for the purpose of defending suits. Thus, it ceased and became dissolved for the purpose of defending suits on April 19, 1919. The Illinois court acted on this basis.

On January 30, 1918, the Illinois court by order referred all pending actions in the several states against the Illinois Surety Company, and against it and the receiver, and all disallowed claims, to a Master to hear the evidence and report with his conclusions of law and fact (fols. 186, 189).

Then, on April 18, 1919, the Illinois court by order directed the receiver to discontinue any further defense of the Illinois Surety Company in either of said actions brought by Mackey and directed him to notify Mackey of the order (fol. 192). The order also directed Mackey to file his claims with said master pursuant to said order of January 30, 1918 (fols. 192, 187). Both said orders were made on due notice to all parties entitled to receive notice (fols. 186, 192).

The latter order, of April 18, 1919, was made on the very day on which the period of two years expired, during which by statute the existence of the corporation was extended for the purpose of defending actions. The court decree and the order of April 19, 1916, restraining the corporation from doing business and placing its assets in the hands of a receiver for liquidation, operated under the statute and caused the charter and existence of the corporation to expire and determine on April 19, 1917. There was thereafter the two years' statutory extension of the corporation for the purpose of defending actions. This period expired April 18, 1919, and on that very day the order was entered directing the receiver to make no further defense of the corporation in the actions brought by Mackey.

It is to be borne in mind that the receiver was never made a party to the action brought by Mackey against the Illinois Surety Company. When said order of April 18, 1919, was made, appearance for the company was at once withdrawn (fols. 54-55), and Mackey then made haste to enter judgment by default thinking to entrap the defendant in the present action.

Natural Necessity of a Time Limit to Outside Actions Against the Corporation.

As pointed out by the learned trial judge, there is an absolute necessity to an orderly administration of the affairs of an insolvent corporation that there should come a time when all claims must be marshalled under the court which has the *res;* and an utter impossibility of any court's liquidating the affairs of an insolvent insurance corpora-

tion if, in defiance of the statutes of the state of its creation, litigations may be indefinitely continued in outlying districts. The court says in part (fols. 73-74):

> "This interest that all the creditors have in the rest and the winding up of the business very naturally suggests that a time limit would be put by order of the court or by statute when this extraneous and outside litigation shall cease * * *. The policy of speedily distributing the assets among the creditors, the statute, evidently, recognizes as being sufficient to justify the risk to be incurred by the individual litigant in not being able to terminate the litigation necessary to liquidate his claim fully."

The Circuit Court said (fols. 207-209):

> "By virtue of the above order of the Illinois Court enjoining the Illinois Surety Company from the further prosecution of its business the charter of the company must be deemed and held to have become extinct in all respects as if it had expired by its own limitation after the lapse of one year from the date of the order as provided in section 3 of the Act of 1874 above quoted. But this corporation in accordance with the provision contained in section 4 of the same Act, also above quoted, continued to be a body corporate for the term of two years after the expiration of its charter for the purpose of prosecuting and defending suits by or against it and for the settlement of its affairs.
>
> "As the Illinois Surety Company was restrained from doing any business by court decree of April 19, 1916, its charter expired on April 19, 1917. As it was continued a body corporate by statute for two years and

> no more after its charter became extinct its existence ceased and it became dissolved for all purposes on April 19, 1919. * * *
>
> "When the State of Illinois which created the Illinois Surety Company terminated its existence its action was as decisive in New York as in Illinois."

In *Sinnott* v. *Hanan*, 214 N. Y. 454, the action was on an undertaking given to discharge an attachment in an action against a New Jersey corporation. The obligor undertook that the defendant in said action would pay "the amount of any judgment which may be recovered in the action against the defendant," the New Jersey corporation. In the action on the undertaking the defense was that the corporation had been dissolved before any judgment was entered against it.

The evidence showed that pursuant to statute of New Jersey the State Comptroller had reported the corporation to the Governor for non-payment of taxes, and the Governor had by proclamation declared the charter of the corporation repealed. By statute of New Jersey the charter then ceased and determined. Collin, J., page 458, says:

> "If additional and other facts had not been proven and found the defense would be securely established, because the common law abates at the dissolution of a corporation all actions pending against it (McCullough v. Norwood, 58 N. Y. 562; Sturges v. Vanderbilt, 73 N. Y. 384; Greeley v. Smith, 3 Story 657)."

A statute of New Jersey provides as follows:

> "All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be

> continued bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established."

The court says of these provisions (p. 459):

> "Their effect was to continue the life of the corporation as to its capacity to prosecute and defend suits by or against it, * * * and to destroy its capacity and existence in all other respects and for all other purposes."

Within the holding of the *Sinnott* case, the present action against the Illinois Surety Company abated when that corporation ceased to exist; and since it was continued for two years only for the purpose of defending suits, the judgment entered without appearance after the lapse of said two years was obtained without jurisdiction.

The same statute of New Jersey was before the court in *Held* v. *Crosthwait*, 260 Fed. 613 (C. C. A., 2nd Cir.). There the Governor had issued a proclamation repealing the charter of the corporation, with other charters, for non-payment of taxes. Thereafter the directors held out the corporation as still in existence and entered into contracts in its name. The issue was whether they were personally liable on such a contract. After the contract was made the corporation paid the taxes and charges and the Governor, pursuant to the statute, by proclamation reinstated the corporate existence, and this was held by the majority of the court to

be a defense. There was an entire agreement on the point that the corporation had ceased to exist pursuant to the statute and the proclamation of the Governor. Ward, C. J., page 616, says:

> "We think it clear that the charter may be and by the statute is repealed by the Governor's proclamation without the necessity of any application to the courts. * * * Therefore the second proclamation of reinstatement must be held to relate to the first proclamation of repeal, and the corporation must be regarded as having continually existed so far as the state is concerned."

Rogers, C. J., page 626, says:

> "But it (the statute) fixed a time for the expiration of the charter and when that time arrived the corporation lost its power to act or to exist."

Yates v. *The People*, 207 Ill. 316, was a petition for a mandamus requiring the Superintendent of Insurance to issue a certificate of authority to transact insurance business. Justice Magruder, page 326, says:

> "It follows that the Act of 1874—providing that the charters of all insurance companies, which have ceased for the period of one year to transact the business for which they were organized, shall be deemed and held extinct in all respects as if they had expired by their own limitation—is fully applicable to the Continental Insurance Company. The latter company appears upon this record as having ceased for the period of one year to transact the business for which it was organized, and, therefore, under the Act of 1874, which was a general law

> passed after the Act of March 7, 1867, its charter must be deemed and held extinct in all respects as if it had expired by its own limitation."

In *Malicki* v. *Bulkley et al., Receivers*, 107 Ill. App. 595, aff'd 206 Ill. 249, action was brought in Michigan against an Illinois life insurance company, and judgment was entered in Michigan against said company after a decree had been made in Illinois dissolving the corporation and appointing receivers for it on December 19, 1900. It was held that the judgment was properly entered against the life insurance company, because it had been entered within two years from the date when the corporation ceased to exist for purposes other than being sued. Waterman, J., page 598, says:

> "An examination of the statute discloses that the decree of dissolution entered against the Chicago Guaranty Fund Life Society did not completely terminate its existence, but that it continued to be a living entity, a body corporate for a term of two years after said decree, for the purpose of prosecuting and defending suits and enabling it gradually to close up its business.
>
> "The judgment obtained by appellant, having been rendered within said two years, was and is, under the statutes of this state, a valid and binding judgment."

In *Blanchard* v. *Gay Co.*, 289 Ill. 421, Justice Duncan says:

> "Appointing a receiver to take possession of the assets of a corporation and to distribute them is tantamount to dissolving the corporation by decree in equity."

In *Droppelman* v. *Illinois Surety Co.*, 95 Wash. 476, it was held that the Illinois Surety Company was dissolved in this proceeding. Holcombe, J., page 476, says:

> "It appears that prior to the appointment of the receiver in this action a receiver had been appointed for appellant in its home state, Illinois, and by the laws there in force the receiver acquired absolute title to the property of appellant as fully as though he had been an assignee thereof and was in fact a quasi assignee or successor. Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328. It is respondent's contention that because of appellant's non-existence it had no right to appear and defend, and that the proper procedure would be for the Illinois receiver to intervene and set up the defense interposed here by appellant. While we agree with respondent that appellant no longer has any existence, we do not agree with the conclusion derived therefrom that it is incumbent on the Illinois receiver to intervene."

In *Thornton* v. *Railway Co.*, 123 Mass. 32, the suit was for an equitable attachment, and was based on an alleged judgment obtained against the railway company in July, 1875. The judgment was held void because the charter of the corporation had been repealed before the judgment was entered, and the judgment was also rendered after the period of three years provided by statute for the continuance of the body corporate for the purpose of defending suits. Gray, C. J., page 341, says:

> "Upon the repeal of the charter of the Marginal Freight Railway Company by the

St. of 1872, c. 342, which was passed and took effect on May 6, 1872, the corporation was nevertheless, by virtue of the Gen. Sts. c. 68, Sec. 36, continued a body corporate for the term of three years afterwards, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock. * * *

"No application having been made for the appointment of a receiver, the Marginal Freight Railway Company, at the expiration of the three years, ceased to have any such existence that a valid judgment could be rendered against it in an action at law."

In *Shore Line Co.* v. *Me. Cent. Co.*, 92 Me. 476, the plaintiff's charter expired, but was extended three years for the purpose of prosecuting and defending suits. It was held that an action brought by it during the three-year period abated at the end of the three years. Haskell, J., page 482, says:

"No part of the line had been constructed on that date (January 28, 1895) and its powers then became extinct. Its charter ceased to exist. It had expired by its own limitation. It was dead, except so far as sec. 24, C. 46, of R. S., continued its existence for three years, 'to prosecute and defend suits'; to settle and close its concerns; to dispose of its property; and to divide its capital.

"This suit was commenced within three years, and, upon the expiration thereof, the defendant moved to dismiss the action, because the same abated for the want of a plaintiff. * * * The plaintiff has no corporate existence and can neither recover judgment nor suffer one against itself. Its

> action has abated, and there is no one who can revive it."

In *Dundee Co.* v. *Hughes*, 77 Fed. 855, a statute of Oregon provided that all corporations after their dissolution shall

> "continue to exist as bodies corporate for a period of five years thereafter if necessary for the purpose of prosecuting or defending actions, suits or proceedings, by or against them, * * * but not for the purpose of continuing their corporate business."

It was held that after the end of the five-year period a corporation could not continue to prosecute an action which it had begun before its dissolution, and that such action abated. Gilbert, C. J., page 856, says:

> "At the expiration of that period it is the logic of the common law rule that the corporation is as absolutely defunct as it would have been in the first instance had not its life been prolonged by the intervention of the statute. The Supreme Court of Massachusetts has held that a judgment recovered against a corporation after the expiration of a similar period of limitation is absolutely void. Thornton v. Freight Co., 123 Mass. 32."

In *Morgan* v. *New York Assn.*, 73 Conn. 151, real estate situated in Connecticut and owned by a New York corporation was attached in an action brought in Connecticut by a resident of that state. Pending the action the corporation was dissolved in an action subsequently begun in New York, and permanent receivers were appointed. It was held that the attachment and action in Connecticut

abated because no judgment could thereafter be obtained against the dissolved corporation. Baldwin, J., page 153, says:

> "An attachment in a suit against a natural person is dissolved by his death, notwithstanding the entry of his administrator to defend, and a judgment duly rendered against the latter. * * * The same principle governs the disposition of attachments, where the defendant is an artificial person which is dissolved pending the action. * * * There can be no judgment or execution against the dead. * * * This is true alike as respects domestic and foreign corporations."
>
> "The state which grants a corporate franchise has exclusive and supreme power to withdraw it, whatever may be the effect of its so doing on property rights which may have been acquired under the laws of other governments."

In *Logan* v. *Greenwich Trust Co.*, 144 App. Div. 372, aff'd 203 N. Y. 611, an action was begun against a non-resident by levy of an attachment, but the defendant died before the summons was served. It was held that a judgment could not be entered against said deceased but the action should be revived against his administrator appointed at the place of his residence. Ingraham, J., page 379, says:

> "The death of the original defendant prevented the continuation of the action or proceeding as against him."

In *Printograph Co.* v. *American Co.*, 161 App. Div. 917, an undertaking to vacate an attachment had been filed before the defendant corporation was dissolved. The memorandum opinion reads:

> "The appeal is dismissed upon the ground that the dissolution of the defendant corporation abates the action, and no proceeding can be taken against it until the action is revived."

In *Bank* v. *Colby*, 88 U. S. 609, Field, J., says, of the abatement of an attachment action by the dissolution of the defendant banking corporation:

> "This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution."

In *Evans* v. *Illinois Surety Co.*, 298 Ill. 101, relied on by petitioner (pp. 22, 30), there was no issue as to when the corporation became defunct for the purpose of obtaining judgment against it in an outside action. The question was whether certain claims were entitled to be filed in the liquidation proceeding.

The corporation had bonded contractors to the State of Ohio. These bonds "terminated by their own limitation, * * * some within less than a year from the appointment of a receiver" (p. 112). "The demand of the claimant arose some time during the life of the bond—that is, it existed prior to the appointment of the receiver—but knowledge of evidence to prove it was not had until thereafter" (p. 112). Proof of claim was made in the liquidation proceeding "within the time limited by the court for exhibiting claims" (p. 114). The receiver contended that since the claims were not due when he was appointed, they were contingent and not provable against the assets in the liquida-

tion proceeding. It was held that provable claims need not be capable of ascertainment at the time the receiver was appointed, and could be proved, at least, within two years from the dissolution of the corporation.

Justice Carter, page 113, says:

> "The question in this case is whether or not the claimant has a provable claim against the insolvent corporation and its receiver so as to charge the assets in the hands of the receiver. Whether the claim is or is not provable is an entirely different question from that of a limitation upon the time when it shall be exhibited and proved."

Page 112:

> "The binding force of the contract between the company and claimant could no more be changed by the *death* of the company or the appointment of a receiver than could that of an individual surety. * * * The rights of the State of Ohio existed at the time the receiver was appointed. The mere fact that the extent of the obligation was not then determinable cannot, in reason, defeat the obligation itself." (Italics ours.)

Page 111:

> "On the question of death of the surety or dissolution of a surety corporation there certainly can be no difference, in principle, between individual and corporation. If death does not relieve an individual surety from the obligation he has entered into, the dissolution or receivership of a corporation cannot relieve a corporate surety."

The court quotes with approval, page 107:

> "With a view of mitigating the rigor of the common law with respect to the effects of a defunct corporation, the legislatures of this and most, if not all, of the other States of the Union, have by appropriate legislative enactments provided for a just and equitable distribution of their assets in cases of insolvency or sudden dissolution from any cause, and our own act on the subject contains a provision which in express terms extends their corporate existence two years from the date of their dissolution, for such purpose."

Again, page 108:

> "Section 4 (Insurance dissolution law) provides that insurance companies whose charters expire by their own limitation or become forfeited for non-user or are dissolved by decree of court or otherwise, shall nevertheless be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their concerns. * * *
>
> "There can be no question that the provisions of the act for the incorporation of companies for pecuniary profit and the provisions of the act for the dissolution of insurance companies are both to be considered as incorporated into the Surety act, under which this company was organized. * * *"

Page 118:

> "The Illinois statutes heretofore cited cannot be construed so as to fix the time for exclusion at less than two years from and after the date of dissolution of the corporation."

That decision very properly holds that the contracts of the corporation did not terminate on the appointment of a receiver or upon its dissolution, and that claims thereon might be filed in the liquidation proceeding for two years after dissolution. No such issue is contained in the present case.

The court did not hold, as stated by petitioner (p. 2), that no decree of dissolution "could be yet entered." It did hold (p. 117) that the court "could not enter a decree of dissolution * * * on the date when the receiver was appointed." There is no intimation that the corporation did not cease to exist as expressly provided by statute.

The court did not hold, as inferred by petitioner (p. 13), that it was at all necessary to enter a decree of dissolution. It held that claims could be filed for two years from the date of dissolution, which may occur by restraining decree or otherwise (p. 118).

In the above case the court quotes Section 4 of the insurance dissolution act which extends such corporations for two years from the expiration of their charter for the purpose of defending suits. It points out (p. 105) that Section 14 of the Surety Act makes such corporations subject to the act concerning corporations of July 1, 1872, only "so far as the same are *not inconsistent* with the provisions of this act." (Italics ours.)

Said Surety Act (of April 17, 1899) makes such corporations subject to the insurance superintendent with respect to certificate of incorporation, investments, required deposit, certificate of authority, visitation, examination and employment of agents (*Hurd's Rev. Stat.*, 1917, p. 739). Then by said Section 14 they are made "subject to the provisions and requirements" of the act of July 1, 1874, "in

regard to the dissolution of insurance companies." This is the specific and primary provision on the point of dissolution.

Thus Sections 10, 11 and 12 of the act of July 1, 1872, are applicable to surety corporations in dissolution only so far as they are not inconsistent with the Surety Act and the act of July 1, 1874, regarding the dissolution of insurance companies. As bearing on what part of the act of July 1, 1872, may be considered inconsistent with the Surety Act and the dissolution act of July 1, 1874, it may be noted that Section 1 of said act of July 1, 1872, provides that:

> "Corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance," etc.

Also that Section 10 of the act of July 1, 1872, relied on by petitioner, provides:

> "All corporations *organized under this law*, whose powers have expired," etc.

Clearly said act of July 1, 1872, was never intended to be applicable to insurance companies except to a limited extent. Moreover, since the dissolution of insurance corporations is governed by a special statutory system, this latter statute will govern in case of any inconsistency, as, in fact, is expressly so stated in said Section 14 of the Surety Act.

Sections 3 and 4 of the act regarding the dissolution of insurance companies, quoted above, expressly provide that the charters of insurance companies "which * * * in obedience to the decree of any court, have ceased * * * for the period of one year, to transact the business * * * shall be

deemed and held extinct in all respects as if they had expired by their own limitation." Also that "insurance companies whose charters expire by their own limitation, or become forfeited by non-user, * * * or otherwise, shall, nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them."

Petitioner contends (p. 18) that there is no difference between said Sections 3 and 4 of the act regarding the dissolution of insurance corporations and Sections 10, 11 and 12 of the act concerning corporations of July 1, 1872. With respect to the point here involved, the difference is obvious as soon as the issue is raised. Section 12 of said act of July 1, 1872, expressly provides that:

> "The dissolution * * * of any corporation created as aforesaid, shall not *take away or impair* any *remedy* given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

The Illinois courts hold that under said statute the corporate existence of a non-insurance corporation is extended indefinitely for the purpose of being sued. Such cases are cited by the petitioner (pp. 18, 28-29), but have no application here.

Said Section 12 is clearly inconsistent with Section 4 of the Surety Act which continues such corporations for two years only for the purpose of prosecuting and of defending suits. There is an inconsistency, and the special act governing dissolution of insurance companies is controlling. It is not even claimed by petitioner that there is any decision of the Illinois courts which holds that a

judgment may be entered against an insurance corporation more than two years after it has ceased to exist by expiration of its charter or otherwise.

The decree of the Illinois court of April 18, 1919, in this instance, is competent evidence of what the law of Illinois is in this respect. Every presumption is in favor of the propriety of this decree and plaintiff offered no conflicting evidence. Moreover, it is shown by the cases cited above, that the law of Illinois supports the decree, and that no judgment could be entered against the Illinois Surety Company after April 19, 1919.

THE FOLLOWING CASES CITED BY PETITIONER DO NOT IN ANY WAY CONCERN THE DISSOLUTION OF AN INSURANCE CORPORATION OR THE STATUTE GOVERNING THE SAME.

Singer & Talcott Co. v. *Hutchinson*, 176 Ill. 48.

Central Stock Co. v. *Pine Tree Co.*, 140 Ill. App. 471.

Graham Co. v. *Owens*, 165 Ill. App. 100.

In *Life Ass'n* v. *Fassett*, 102 Ill. 315, cited by petitioner (pp. 19, 34), lands owned by a Missouri corporation had been attached in Illinois before an order dissolving the corporation was made in Missouri.

The order dissolving the corporation provided (p. 329) that *suits were authorized to be brought and defended* in the name of the corporation. The lien on the lands persisted. The order of dissolution did not dissolve the corporation for the purpose of defending actions. The statute in regard to the dissolution of Illinois insurance corporations

was not under consideration. Justice Mulkey, page 325, says:

> "It is not denied, or even questioned, that by the common law a corporation which has been dissolved absolutely, for all purposes whatsoever, stands upon the same footing as a dead person with respect to any power in the courts to enter a valid judgment against it."

In *Commercial Trust Co.* v. *Mallers*, 242 Ill. 50, cited by petitioner (p. 29), the corporation was a banking corporation and it was held that Section 10 of the act concerning corporations did not apply to it. Neither did the act with regard to the dissolution of insurance corporations apply to it and the same was not mentioned.

II.

The court had no jurisdiction to enter judgment against the Illinois Surety Company after its charter, and the two years extension for defending actions, had expired.

The charter expired by its own limitation one year from April 19, 1916, and the corporate existence was extended for two years only for the purpose of prosecuting and defending suits. No judgment could be entered against it after April 19, 1919.

In *Pendleton* v. *Russell*, 144 U. S. 640, Justice Field says:

> "The judgment purports to be against the insurance company, but that company, at

> the time, had no legal existence. It had been dissolved and its franchises, rights, and privileges declared forfeited. * * * The judgment was therefore no more valid against a non-existing corporation than it would have been if rendered for a like amount against a dead man."

In that case the action was properly begun against the corporation, and the original judgment was duly obtained against it, but the original judgment was reversed on appeal, and pending the appeal the corporation was dissolved and a receiver appointed. The receiver employed counsel to argue the appeal from the original judgment and the same was reversed. It was held that no judgment could thereafter be rendered against the corporation because it had ceased to exist.

In *Martyne* v. *Amer. Ins. Co.*, 216 N. Y. 196, Chase, J., says:

> "We have recently held in Sinnott v. Hanan (214 N. Y. 454, 458) that where a statute relates to and regulates corporate existence and power it has extra territorial operation and effect, even as had the statute under which the corporation was created and which was a part of its charter and the law of its existence."

The Court quotes with approval from *Relfe* v. *Rundle*, 103 U. S. 222, as follows (pp. 195-196):

> "Every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

The court also quotes with approval from *Wulff* v. *Roseville T. Co.*, 164 App. Div. 399, as follows (p. 196):

> "As commerce and commercial transactions between the citizens of the different states have increased, the tendency has been to extend the rule of comity where not incompatible with our own laws and with the rights of the citizens of our own state."

In *Sturges* v. *Vanderbilt*, 73 N. Y. 384, a corporation's charter expired prior to the entry of judgment against it in an action that was pending when the charter expired. The judgment was held void and open to collateral attack.

Rapallo, J., page 390, says:

> "But the principle upon which that class of cases rests is not applicable to a dissolution by expiration of the charter. The dissolution in such a case is declared by the act of the legislature itself. The limited time of existence has expired and no judicial determination of that fact is requisite. The corporation is *de facto* dead. (Citing cases.) Where the charter of a corporation is annulled by act of the legislature, the corporation is extinct and no judgment can be rendered against it. (Citing cases.) We have been referred to no authority holding a contrary doctrine."

In *Eagle* v. *Kelsey*, 23 Kan. 625, Horton, J., says:

> "If we assume that the common law is in force in Indiana, then upon the expiration of the charter of the plaintiff, it ceased to exist for any purpose."

III.

Further answering the brief for petitioner.

A.

THE RESTRAINT CONTAINED IN THE DECREE OF APRIL 19, 1916, IS CLEARLY FINAL.

Petitioner argues (pp. 20-26) that the restraining decree of the Illinois court must be a final decree to set the statute in operation, and that the decree of April 19, 1916, is not a final decree.

The answer of the corporation admitted insolvency and the necessity for the appointment of a receiver to liquidate the assets (fol. 181). The case came duly on for disposition and the court heard oral testimony, and found the averments of the bill to be true, and did "adjudge and decree" that the company "be and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business." This was clearly final.

There was no issue as to the propriety of the decree, and none has been raised since. The claim of the petitioner (pp. 26-27) that there was an issue as to insolvency and whether new capital could be had, is mere pretense, and has no support in the record. Of course, an application could have been made for a rehearing and if in such manner the decree had been disturbed, the statutory limitation of the charter would have ceased to run.

Moreover, said Section 3 of the statute for the dissolution of insurance companies does not require a final decree restraining the corporation, but merely "the decree of any court." Of course, the decree entered was not one dissolving the corporation forthwith. It operated under the statute to cause the charter to expire on April 19, 1917.

In *Evans* v. *The Illinois Surety Co.*, 201 Ill. App. 578, cited by petitioner (p. 21), it appears that by order of court the Attorney General intervened and filed a petition and an answer to the bill, in both of which he admitted the necessity for the appointment of a receiver.

That the complainants appealed from the order permitting the Attorney General to become a party, and the Attorney General appealed from the order appointing the receiver on the ground that it was made without notice to him. The appeals were both dismissed, as taken from interlocutory orders which were not appealable under the Illinois statute. There was no attempt to appeal from the order enjoining the corporation from doing business, or from the order appointing the receiver as such.

In *Evans* v. *Potts*, 204 Ill. App. 212, cited by petitioner (p. 21), it appears that the Insurance Superintendent appeared and was made a party defendant by order of court. It was held that such an order was not appealable, although an order enjoining the corporation or appointing a receiver was appealable under the statute, but no appeals were taken from said orders and no objection was made as to them.

It is clear that the decree restraining the corporation from doing business and the order appointing the receiver have never been attacked, and are final in the sense that under the statute, they determine the extent of the corporate existence. Of course, the proceedings for distribution are not finally terminated thereby.

In *Ward* v. *Farwell*, 97 Ill. 593, cited by petitioner (p. 23), the act in regard to the dissolution of insurance companies was held constitutional, and it was held that the stockholders were not par-

ties to a bill for the dissolution of such a corporation, and that where the circumstances calling for a decree restraining the corporation from doing business are admitted, no issue is raised which requires a hearing. Justice Mulkey, page 619, says:

> "In the present case, as the facts in the petition were admitted, the necessity of a hearing was obviated; but the court should, before appointing the receiver, have entered a final order or decree upon the merits, either dissolving the corporation or restraining it from the further continuance of its business. But the failure to do so was merely error, which did not at all affect the jurisdiction of the court, and hence is of no importance in the present case—for if the court had jurisdiction of the subject-matter of the suit and of the parties, the regularity of the receiver's appointment cannot be inquired into in the present suit."

The court there speaks of an order restraining the corporation from doing business as the equivalent of an order dissolving the corporation, and as clearly laying the foundation for the appointment of a receiver to liquidate the assets. In the present case the court did enter a decree restraining the corporation from doing any further business and such decree was final on that point.

B.

SECTION 3 OF THE STATUTE FOR DISSOLUTION OF INSURANCE COMPANIES APPLIES TO ALL ACTIONS.

Petitioner argues (pp. 16-17) that said Section 3 does not apply to a suit by stockholders for dissolution and liquidation of the corporation. No case is cited in support of this claim and it is obvious

that the statute makes no such discrimination against an action by stockholders. Sections 1 and 2 provide for involuntary and voluntary dissolution, and then Section 3 provides without any distinction, that the "charters of all insurance companies * * * which * * * in obedience to the decree of any court," etc. There is clearly no discrimination against an action by stockholders, and it has never been so held. The Illinois procedure, in this instance, in entering the restraining order before appointing a receiver is further evidence that the restraining order is to comply with the statutory system for the dissolution of insurance companies.

C.

There Was Sufficient Court Action.

Petitioner argues (pp. 31-33) that this is a case of forfeiture and requires court action to become operative. In fact, there was court action in the decree adjudging the corporation insolvent and restraining it from doing business. This is precisely the court action called for by the statute to effect its dissolution. It was solely pursuant to this plan of the statute that the restraining decree of April 19, 1916, was made. Otherwise, the order appointing the receiver would have sufficiently restrained the corporation from doing business.

Moreover, through such court action the charter expired by its own limitation under the statute. It is not a case of forfeiture. It has long been settled that the expiration of a corporation's charter, even without any court action, terminates its existence for all purposes.

Where the statute provides that in a certain event the corporate existence or charter shall cease and determine, the provision is self-executory and on the occurrence of the event the corporation ceases to exist for all purposes without any court action.

Matter of Brooklyn Railroad Co., 106 App. Div. 240; aff'd 185 N. Y. 171.
Matter of Brooklyn, etc., Railway Co., 72 N. Y. 245.
Brooklyn Transit Co. v. City, 78 N. Y. 524.
People v. *Stilwell*, 157 App. Div. 839, 843.

D.

THE AUTHORITY OF THE RECEIVER TO DEFEND ACTIONS IN THE NAME OF THE ILLINOIS SURETY COMPANY REFERS MERELY TO THE PERIOD OF THREE YEARS DURING WHICH ACTIONS COULD BE PROSECUTED AGAINST IT UNDER THE STATUTE.

Petitioner argues (pp. 33-35) that because the receiver had power, until the expiration of the charter on April 19, 1919, to defend suits either in his own name or that of the corporation, this nullifies the statutory expiration of the charter.

The power of the receiver "to prosecute and defend suits in the name of the Illinois Surety Company or in his own name" naturally refers to the three years during which actions could be continued against the corporation. It clearly does not have the effect of nullifying the statutory dissolution of the corporation. This is also shown by the fact that on April 18, 1919, the receiver was directed to make no further defense of the corporation in the action brought by Mackey (fol. 192).

The receiver was not a party to the action, and the defense of the corporation until April 19, 1919, could not, and did not, revive the action against him. He could not have become a party without the consent of the Illinois court. In *Porter* v. *Sabin*, 149 U. S. 479, Justice Gray says:

> "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. * * *
>
> "It is for the court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. * * * Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him."

In *Pease* v. *Rathbun*, 243 U. S. 273, cited by petitioner (p. 34), the corporation was expressly continued in existence for the purpose of prosecuting and defending actions.

In the present case the statute expressly states when the existence of the corporation shall expire for the purpose of defending actions. Then, at the end of said period, the Illinois court expressly directed the receiver to discontinue any further defense of the corporation. This order alone would have the effect of terminating any prior authority.

SUMMARY.

It is apparent that an enormous judgment has been entered against the Illinois Surety Company by default, and on a delayed claim which bears all the indications of being only colorable, and a backfire against the claims of the Illinois Surety Company for property converted and stolen.

The original complaint was for $7,498.02 (fols. 81-82). The amended complaint was for $23,000 (fol. 97). The judgment was entered by default for $37,041.95, which bears no relation to the demand in the complaint, and has no support in law (fol. 129). The counterclaims of the Illinois Surety Company for securities and assets converted by Mackey amounting to $153,914.56 (fol. 109), were, of course, not presented to the referee.

The claim of Mackey was delayed and never prosecuted as a live claim while the corporation continued to exist for defending actions. Then, when further defense was forbidden by the Illinois court, Mackey at once obtained this colorable judgment, in an attempt to entrap the present defendant by a judgment entered without opposition and after the decease of the Illinois Surety Company.

The Illinois Surety Company had ceased to exist when the judgment was entered, and when the motion for the appointment of the referee was made. The judgment is a nullity in both Illinois and New York. It is nothing to which the present defendant could be subrogated. The Illinois court had expressly ordered that the action be not further defended, on the ground that no judgment could be entered after April 19, 1919.

The judgment of the Circuit Court of Appeals should be in all respects affirmed.

Respectfully submitted,

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of Counsel.

SEP 26 1921
JAMES D. MAHER,
Clerk.

Supreme Court of the United States.

October Term, 1921.

No. [redacted]32

John Ewen,

Petitioner,

against

American Fishery Co.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Abram I. Elkus,
Attorney for Respondent.

Joseph M. Proskauer,
William B. Hornblower,
Of Counsel.

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WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 348.

JOHN EWEN,
Petitioner,

against

AMERICAN FIDELITY CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The action was tried in the District Court before the Court and a jury of one, any further use of a jury having been waived by stipulation, and the Court directed a verdict dismissing the complaint on the merits (*fols.* 102, 108). Plaintiff by writ of error took the case to the Circuit Court of Appeals, for the Second Circuit, which affirmed the judgment (*fol.* 645).

Respondent denies that the decision of the Circuit Court of Appeals in any way varies from that of the District Court, and denies that their decisions are in any way contrary to the opinions of the Courts of Illinois, or of this Court, or of the Federal Courts, as alleged in the petition at paragraphs 12-14.

On the contrary, the decision which the peti-

tioner seeks to review is in accord with the decisions of the Courts of Illinois and of New York, and of this Court and the Federal Courts.

The moving petition (paragraph 12) also erroneously alleges that the Circuit Court held that the Illinois Surety Co. was relieved from liability, whereas the decision is merely that after it ceased to exist under the law of its creation a judgment by default could not be duly entered against it, although a claim could be prosecuted in the insolvency and dissolution proceedings (*fols.* 614-5, 625).

Statement of Facts.

The action is on an undertaking in the amount of $7,500 given to discharge an attachment in the State Court. Plaintiff's assignor, one Mackey, sued the Illinois Surety Company in the New York Supreme Court of Kings County, and obtained an attachment against the Illinois Surety Company. The defendant in the present action gave the undertaking sued on to discharge said attachment under the statute (*fol.* 11, Code of Civ. Pro., Sec. 688).

The action against the Illinois Surety Co. was begun on May 21, 1915 (*fol.* 245). The undertaking sued on was executed and filed on July 9, 1915 (*fol.* 11). The attachment was vacated on July 10, 1915 (*fol.* 12). The plaintiff herein claims that Mackey duly recovered judgment against the Illinois Surety Co. for $37,041.95 on June 21, 1919, in said action (*fol.* 386).

The defendant contends and the courts have found that the Illinois Surety Co. was dissolved and its existence ceased before June 21, 1919, and that the alleged judgment by Mackey was not duly recovered (*fols.* 216-222).

The Illinois Surety Company was a surety corporation organized in 1905 and existing under the laws of Illinois (*fols.* 197, 501-2). It was dissolved in that state and its existence ceased long before the judgment alleged to have been obtained by plaintiff's assignor against it, and the action brought by plaintiff's assignor against it abated, and plaintiff's assignor never duly obtained any judgment against it in said action.

The statute under which it was organized is "An Act to provide for the organization, management and regulation of surety companies," in force April 17, 1899. This statute provides that such companies shall be subject to the provisions of "An Act in regard to the dissolution of insurance companies," in force July 1, 1874. The Trial Court took judicial notice of the statutes of Illinois.

DISSOLUTION OF ILLINOIS SURETY COMPANY

On April 19, 1916, a majority in number and interest of the stockholders of the Illinois Surety Company filed a bill in the Superior Court of Cook County, Illinois:

> "To close said company and to procure a decree of dissolution of the corporation in the manner provided by law" (*fol.* 504).

They enumerated the assets of the corporation in all states, and alleged that the corporation was insolvent and that if a receiver should not be appointed it would be subject to a multiplicity of suits and its property lost and depleted by expenses and unevenly distributed to its creditors (*fols.* 519-520).

They asked that the

> "Illinois Surety Company may be re-

> strained by proper decree * * * from further prosecution of its business, * * * and that a receiver be appointed forthwith, to take charge of the estate and effects of said corporation, including all such securities as are deposited in this and other states, to collect the debts due and the property belonging to said corporation with power to prosecute and defend suits in the name of said corporation, or in the name of said receiver, and to do all other acts necessary for the collection, marshalling, and distribution of the assets of said Illinois Surety Company and the closing of its concerns" (*fols.* 521-2).

No other form of dissolution is asked for.

On the same day, April 19, 1916, the Illinois Surety Company filed an answer to the bill, admitting all the allegations thereof, including insolvency (*fol.* 536).

On the same day, April 19, 1916, oral testimony was taken in the Superior Court of Cook County, Illinois, which found that the averments of the bill were true, and decreed:

> "1. That the said Illinois Surety Company, be and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business."

(Order, Apr. 19, 1916, pp. 180-181, *fols.* 539-543).

On the same day, April 19, 1916, the Superior Court of Cook County made a separate order appointing James S. Hopkins receiver (Ex. B 4, pp. 183-4), of all the property of the corporation or held for its account wherever situated (*fol.* 549). The receiver was expressly given:

> "power to prosecute and defend suits in the name of the Illinois Surety Company, or in his own name" (*fol.* 550).

The receiver took possession at once under the order appointing him and has been liquidating the assets ever since (*fols.* 428-9, 458).

The procedure in Illinois for the winding up of an insolvent surety corporation consists of the following steps (The statutes will be referred to immediately hereafter):

1st. An injunction is issued restraining the corporation from doing business, and a receiver is then appointed by separate order.

2nd. After this injunction issues the statute provides that the corporation shall have life for one year.

3rd. The statute provides that after the expiration of this one year the corporation shall be continued alive for two years for the purpose only of prosecuting and defending suits.

4th. After the expiration of this two year period the corporation is defunct under the Illinois statute for all purposes.

The judgment against the Illinois Surety Company was entered after the expiration of the full three year period from the time it ceased to do business pursuant to the decree of the court and therefore after the corporation became defunct for all purposes.

NATURAL NECESSITY OF A TIME LIMIT TO OUTSIDE ACTIONS AGAINST THE CORPORATION.

The court is referred to the very clear and persuasive opinion of Judge Cushman beginning on page 72 of the record to meet the contention in the brief of plaintiff-in-error that this defense is a merely technical one. Judge Cushman there points out the absolute necessity to

the orderly administration of the affairs of an insolvent corporation that there should come a time when all claims must be marshalled under the court which has the *res,* and the utter impossibility of any court's administering the affairs of an insolvent corporation, if, in defiance of the statutes of the state of the creation of the corporation, litigations may be indefinitely continued in outlying districts.

The Court says in part (*fols* .219-220):

> "This interest that all the creditors have in the rest and the winding up of the business very naturally suggests a time limit would be put by order of the Court or by statute when this extraneous and outside litigation shall cease * * . The policy of speedily distributing the assets among the creditors, the statute, evidently, recognizes as being sufficient to justify the risk to be incurred by the individual litigant in not being able to terminate the litigation necessary to liquidate his claim fully."

STATUTE OF ILLINOIS AND PLAN OF DISSOLUTION OF INSURANCE CORPORATIONS.

Sections 3 and 4 of the act entitled "An act in regard to the dissolution of insurance companies," approved February 17, 1874, in force July 1, 1874, were in force at all times material herein. (*Hurd's Rev. Stat. of Illinois,* 1917, Part 2, Ch. 73, pp. 1,679-80). They provide as follows:

> "§3. The charters of all insurance companies incorporated in this state, which either from neglect or by vote of their members or officers, or in obedience to the decree of any court, have ceased or shall hereafter cease, for the period of one year, to transact the business for which they were

organized, shall be deemed and held extinct in all respects, as if they had expired by their own limitation; and the circuit court shall have authority, upon application, by the petition of the auditor of state, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns; provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors.

"§4. Insurance companies whose charters expire by their own limitation, or become forfeited by non-user, or are dissolved by decree of court, or otherwise, shall, nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized."

This section is referred to as section 14 in the opinion of the court below (*fol.* 218) which follows the numbering of Hurd's Rev. Stat. of Illinois (1917) Part 2, pp. 1,679-80.

Section 3 provides that the charters of all insurance companies incorporated in Illinois "shall be deemed and held extinct in all respects, as if they had expired by their own limitation," when they have ceased for one year to transact business, in obedience to a court decree, as here, among other reasons. This is modified by the provision that this section (3) shall not be construed to relieve such company from its liabilities.

Section 4 is a complement to section 3. It provides that insurance companies whose charters

expire or are dissolved by court decree, or otherwise, shall be continued bodies corporate for two years after such expiration or dissolution, for the purpose of prosecuting and defending suits, among other purposes.

The Illinois Surety Company was restrained from doing any business by court decree, as provided by statute, dated April 19, 1916, and hence its charter expired on April 19, 1917. It was continued a body corporate by statute for two years and no more after its charter became extinct, for the purpose of defending actions. Thus it ceased and had become dissolved for all purposes on April 19, 1919. The Illinois court has acted on this basis.

On January 30, 1918, the Superior Court of Cook County by order referred all actions pending in the several states against the Illinois Surety Company, and against the Illinois Surety Company and the receiver, and all disallowed claims, to a master to hear the evidence and report with his conclusions of fact and law (*fol.* 566).

Then on April 18, 1919, the Superior Court by order directed the receiver to discontinue any further defense of the Illinois Surety Co. in either of the actions brought by Mackey in the Supreme Court of Kings County, New York, and directed him to notify Mackey of the order (*fol.* 575). The order also directed Mackey to file his claims with said master pursuant to said order of January 30, 1918 (*fols.* 574, 576). Both of said orders were made on due notice to all parties entitled to receive notice (*fols.* 573, 556).

This latter order was made precisely at the end of the period of two years during which by statute the existence of the corporation was extended for the purpose of defending actions. The court decree and order of April 19, 1916, restraining the

corporation from doing any business and placing its assets in the hands of a receiver for liquidation, acted under the statute and caused the charter and existence of the corporation to expire and determine on April 18, 1917. There was thereafter the two years' statutory extension of the corporation for the purpose of defending actions. This period expired on April 18, 1919 and *on that very day* the order was entered directing the receiver to discontinue any further defense of the corporation in the actions brought by Mackey.

This order of April 18, 1919, was served on Mackey as soon as it was made (*fol.* 169), and he then made haste to obtain a judgment against the Illinois Surety Company without its further appearance although no legal proceeding had previously been had in said action for a long time.

It is to be borne in mind that the receiver was never made a party to the action brought by Mackey against the Illinois Surety Company. As soon as the order of April 18, 1919, was made the receiver directed the attorneys who had hitherto appeared for the corporation to discontinue such appearance and they at once notified Mackey that their authority to appear for the corporation had been withdrawn as follows:

> "You will please take notice that the authority of the undersigned to represent the defendant in the above entitled action and to accept service of papers therein on its behalf, and to appear for it therein, has been terminated and revoked, and that we are no longer authorized to accept service or to appear as attorneys for the defendant in this action. Dated April 28, 1918" (*fol.* 162).

There was no further appearance for the Illinois Surety Company in that action. After April 18,

1919, the Illinois Surety Company had ceased to exist for all purposes and the New York Court lost jurisdiction to enter a judgment against it.

THE STEPS TAKEN IN "MACKEY VS. ILLINOIS SURETY COMPANY."

The bill for dissolution of the corporation alleges that one of the causes of insolvency of the Illinois Surety Company was that D. C. Mackey had been its agent in New York City to execute fidelity and surety bonds, and that he had been dishonest, in that he had written a large number of bonds without reporting them to the home office (Bill, *fol.* 514). This was one of the allegations which the court found to be true in its order of April 19, 1916 (*fol.* 542).

Mackey brought two actions in the New York Supreme Court of Kings County, both to recover an alleged balance of commissions due under contracts whereby Mackey acted as agent and broker for the Illinois Surety Company in obtaining applications for bonds and issuing the same (*fols.* 113-4). The action in which the defendant herein filed the undertaking sued on was the second action, the summons of which is dated May 11, 1915 (*fols.* 116, 227).

THE ACTION WAS DELAYED UNTIL THE CORPORATION WAS DISSOLVED AND APPEARANCE FOR IT WITHDRAWN.

The original complaint in Mackey's said action No. 2 alleged that $7,498.02 was due for commissions on account of bonds executed (*fol.* 243). Issue was joined on July 6, 1915 (*fol.* 149) and the case was noticed for trial for the October 4th, 1915, term (*fol.* 254). It was reached for trial on October 6, 1916, and was passed by plaintiff from

time to time until December, 1916, when the plaintiff had it marked reserved generally (*fols.* 152-4). The plaintiff could have restored it to the calendar for trial on 5 days' notice, but he allowed it to "rest quietly" on the "reserved generally" calendar until October, 1917 (*fols.* 156-7).

Then on November 21, 1917, an order was entered allowing plaintiff to amend his complaint (*fol.* 267). The amended complaint raised the amount of damages claimed from $7,498.02 to $23,000. (*fol.* 290). The answer of the Illinois Surety Company is a general denial that any amount was due, and counterclaimed for $153,914.56, a large part of which was for moneys and collateral converted by Mackey while acting as agent of the defendant (*fols.* 321, 325). Mackey's reply to these counterclaims is dated January 18, 1918, and is a general denial (*fol.* 345).

The action was referred to Mr. Larremore to hear and determine the same. Mr. Larremore died in August, 1918, the case not having been determined (*fol.* 158).

No legal step was taken after the death of Mr. Larremore in August, 1918, until after the order of the Superior Court of Cook County on April 18, 1919, directing that no further defense of the Illinois Surety Company be made in the actions brought by Mackey (*fol.* 575).

New Reference Obtained After Dissolution of Defendant and Without Appearance for It.

After receiving a copy of this order of the Superior Court (*fols.* 169, 494), and after receiving, on April 29, 1919, from the former attorneys of the Illinois Surety Company notice that their authority had been revoked and they no longer ap-

peared for the corporation (*fol.* 161), Mackey obtained, without any appearance for the Illinois Surety Company (*fol.* 163), an order dated May 1, 1919, referring said action No. 2 in the New York Supreme Court to another referee (*fol.* 351).

JUDGMENT ENTERED WITHOUT APPEARANCE FOR ILLINOIS SURETY CO. AND FOR AN AMOUNT GREATLY EXCEEDING THE DEMAND OF THE COMPLAINT.

Likewise without any appearance for the Illinois Surety Company he obtained a report from the referee and caused to be entered a judgment for $37,041.95 (*fols.* 164-5, 369, 386), on a complaint that demanded only $23,000 (*fol.* 290). Said referee's report and said judgment recite that the defendant did not appear (*fols.* 369, 383). The testimony previously taken was not used on this new reference (*fol.* 369).

There was no attempt to appear for the Illinois Surety Company after its demise and dissolution on April 18, 1919, pursuant to the law of its incorporation to which it was at all times subject. Said judgment is void and was entered without jurisdiction over the Illinois Surety Company, which had ceased to exist under the Illinois decree and statute when the order of reference and judgment were made.

The Opinions of the Courts below.

The Trial Court held that by the decree restraining the corporation from doing business and the order appointing the receiver, both dated April 19th, 1916 (*fols.* 542, 547) the non-user provided for by the governing statute began to run and the corporation ceased to exist for all purposes by April 19, 1919 (*fols.* 217-18).

The Circuit Court of Appeals in a comprehensive opinion affirmed the decision of the Trial Court. It held that

> "As the Illinois Surety Co. was restrained from doing any business by court decree of April 19, 1916, its charter expired on April 19, 1917. As it was continued a body corporate by statute for two years and no more after its charter became extinct, its existence ceased and it became dissolved for all purposes on April 19, 1919" (*fol.* 625).

That when the Illinois Court by order of April 19, 1919, directed the receiver to discontinue any further defense of the Illinois Surety Co., and the attorneys who had appeared for the Illinois Surety Co. notified Mackey that their authority had been terminated and revoked,

> "Mackey made haste to obtain the judgment in the New York action,"

which action had been commenced in May, 1915. and

> "had been prosecuted, it must be admitted, with much indifference through a period of four years, there being no adequate explanation given of the reason for the delay" (*fols.* 627-8).

That when the State of Illinois "terminated its existence its action was as decisive in New York as in Illinois" (*fol.* 629).

The court holds that the decree of April 19, 1916, is in fact a decree under Section 3 of said Illinois statute (*fols.* 630-3, 542). This is clearly correct.

The decree recites that it was made when the case came on to be heard upon the bill and petition, and the answer admitting all the material

allegations, and on the appearance of the petitioners and of the Illinois Surety Co., and the court "being fully advised in the premises," finds from the bill and petition and answer and "oral proof heard in open court that the averments in said bill and petition are true" (*fol.* 542).

The language is that the court "doth order, adjudge and decree," which shows that the Illinois Court considered that it was making a decree, and it is settled that as to the practice and construction under state statutes the construction of the courts of that state are final.

The decree plainly and palpably determined on the merits the issue as to whether the Illinois Surety Co. should be enjoined and restrained from further prosecuting its business. This was all that it was necessary to determine to set the limitation of the statute running, and it this decree was obviously entered for that purpose only, since the receiver was appointed by a separate decree (*fol.* 548). Such is the statutory method of liquidating and terminating the existence of an insurance company in Illinois. (*Ward* vs. *Farwell*, 97 Ill., 593).

Nothing further remained to be done on the point of restraining the Illinois Surety Co. from doing business.

It is true that the decree contains the words "until further order of this court," but this does not prevent the decree from operating as such on the point of restraining the corporation from doing business under the statute. The statute requires merely "the decree of any court" to set the limitation running, and not a "final decree." Of course the property had yet to be administered and the claims marshalled. The court might also conceivably have removed the restraining decree if sufficient new capital had been put into the

Illinois Surety Co., but this could not prevent the decree from operating as a decree restraining the corporation from doing business under the statute.

The petitioner argues throughout his brief as if the statute prescribed a "final decree" for the purpose of setting the limitation of the statute running. Said section 3, however, does not use the word "final." It is the restraining decree plus the lapse of time that terminates the existence of the corporation. The decree entered in this instance was a final decree, entered on the merits, restraining the corporation from doing business, and it has in no way been modified, and hence existence of the corporation ceased under the statute.

In *French* vs. *Shoemaker*, 79 U. S., 86, a decree provided "that leave was given to either party to apply, at the foot of the decree, for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it." *Justice* CLIFFORD says:

> "As nothing remains to be done, unless a new application shall be made at the foot of the decree, the court is of the opinion that the decree is a final one, as it has conclusively settled all the legal rights of the parties involved in the pleadings."

In *Stovall* vs. *Banks*, 77 U. S., 583, *Justice* STRONG says:

> "It is not unusual in courts of equity to enter decrees determining the rights of parties, and the extent of liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final."

As to Petitioner's Statement of Facts.

At page 15 of petitioner's brief, it is said that the order appointing a receiver provides that:

> "jurisdiction is hereby expressly retained until final hearing and settlement thereafter of all unfinished business of said Illinois Surety Company, and the receivership herein."

What the order provides is:

> "That the said receiver shall, and he is hereby given leave to apply to this Court for such further orders and directions as equity and justice and the rules of this Court require in relation to and concerning the collection, marshalling and distributing of the assets of said Illinois Surety Company, and the closing of its concerns, for all of which purposes jurisdiction is hereby expressly retained until final hearing and settlement thereafter of all unfinished business of said Illinois Surety Company, and the receivership herein" (*fol.* 552).

When the whole clause is read, it fully appears that the retained jurisdiction refers to the administration of the assets, and that the final hearing also relates to the assets and settlement of claims.

This clause does not refer, as petitioner contends, to any contemplated final hearing on the question whether the corporation should be restrained from doing business. That decree had already been entered.

Petitioner's brief, page 16, states that there was entered on the record in the Mackey action that the receiver was defending the action in the name of the Illinois Surety Company. The Illinois Surety Company had not then ceased to exist, and

the three years period from April 19, 1916, was still running. It was not entered on the record that the receiver was defending the action, but that the receiver was employing the same attorneys to continue the defense of the Illinois Surety Company after it was restrained from doing business, but while judgment might be entered against it (*fols.* 207-8).

Petitioner's brief, page 16, states that an order was entered in the dissolution proceedings on July 10, 1916, authorizing the receiver:

> "to continue and carry on the business of said Illinois Surety Company, under the directions of this Court * * * until the further order of this Court (*fol.* 443)."

What actually happened bears little or no resemblance to this statement. The receiver was appointed to liquidate the surety business, and not to carry it on, and he acted as such (*fols.* 550, 428). In conducting the business of liquidating the surety company, the receiver asked the Court for leave to surrender the old lease of premises to the surety company and take a lease of smaller premises at the same address, and this leave was granted; and by putting in the words omitted by petitioner, the leave given to the receiver is:

> "to continue and carry on the business of said Illinois Surety Company under the directions of this Court in said Corn Exchange Bank Building, at No. 136 So. La Salle Street, Chicago, Illinois, until the further order of this Court."

The petition and order in evidence show plainly that the receiver was not carrying on the business of the Illinois Surety Company except in the sense of liquidating it, and that all business of the com-

pany stopped with the restraining decree and with the appointment of the receiver (*fols.* 428-448).

Petitioner's brief, page 16, states that after the making of the decree restraining the Illinois Surety Company from doing business, the Attorney General and the Superintendent of Insurance intervened and were made parties defendant, and authorized to serve answers, and cites *Evans* vs. *Ill. Surety Co.*, 201 Ill. App., 578, and *Evans* vs. *Potts*, 204 Ill. App., 212. In fact, both these cases show that the restraining decree and the order appointing the receiver based on said restraining decree were never questioned.

In *Evans* vs. *Ill. Surety Co.*, 201 Ill. App., 578, it appears that by order of court the Attorney General intervened and filed a petition and an answer to the bill, in both of which he admitted the necessity for the appointment of the receiver and hence of the restraining decree.

That the complainants appealed from the order permitting the Attorney General to become a party and the Attorney General appealed from the order appointing the receiver *on the ground that it was made without notice to him.* The appeals were both dismissed, as taken from interlocutory orders which were not appealable under the Illinois statute. There was no attempt to appeal from the restraining decree or from the order appointing the receiver as such.

In *Evans* vs. *Potts*, 204 Ill. App., 212, it appears that the Superintendent of Insurance appeared and was made a party defendant by order of court. It was held that such an order was not appealable, although the decree enjoining the corporation and the order appointing the receiver were ap-

pealable under the statute, but no appeal was taken from them, and no objection made to them.

It is clear that the decree restraining the corporation from doing business, and the order appointing the receiver have never been attacked, and are final in the sense that under the statute they determined the extent of the corporate existence. Of course, the proceedings for distribution are not finally determined thereby.

POINTS.

I.

An action against a corporation abates on its dissolution or when its existence ceases by expiration of the charter or otherwise.

Sinnott vs. *Hanan*, 214 N. Y., 454;
Martyne vs. *Amer. Ins. Co.*, 216 N. Y., 196;
Sturges vs. *Vanderbilt*, 73 N. Y., 384;
Cyc., Vol. 10, pages 1270, 1314, 1316-7;
Blanchard vs. *Gay Co.*, 289 Ill., 421;
Pendleton vs. *Russell*, 144 U. S., 640;
Carr vs. *Hamilton*, 129 U. S., 252, 32 L. Ed., 669;
Thornton vs. *Railway Co.*, 123 Mass., 32;
Eagle Co. vs. *Kelsey*, 23 Kan., 635;
Marion Co. vs. *Perry*, 74 Fed., 425;
Merchants Loan Co. vs. *Clair*, 107 N. Y., 663;
Hollingshead vs. *Woodward*, 107 N. Y., 96;
Droppelman vs. *Illinois Surety Co.*, 95 Wash. St., 476;
Yates vs. *The People*, 207 Ill., 316;
Shore Line R. R. Co. vs. *Me. Cent. R. R. Co.*, 92 Me., 476;

Dundee Co. vs. *Hughes*, 77 Fed., 855;
Morgan vs. *New York Nat. Bldg. Asso.*, 73 Conn., 151;
Logan vs. *Greenwich T. Co.*, 144 App. Div., 372, aff'd 203 N. Y., 611;
Case note, 32 L. R. A. N. S., 447.

In *Sinnott* vs. *Hanan*, 214 N. Y., 454, the action was on a bond given to discharge an attachment of property in an action against a New Jersey corporation, which provided that the bondsman would pay "the amount of any judgment which may be recovered in the action against the defendant," the New Jersey corporation. In the action on the bond the defense was that the corporation had been dissolved before any judgment was entered against it.

The evidence showed that pursuant to statute of New Jersey the State Comptroller had reported the corporation to the Governor for nonpayment of taxes, and the Governor had by proclamation declared the charter of the corporation repealed. By Statute of New Jersey the charter then ceased and determined.

Collin, *J.*, page 458, says:

> "If additional and other facts had not been proven and found the defense would be securely established, because the common law abates at the dissolution of a corporation all actions pending against it. (*McCullough* vs. *Norwood*, 58 N. Y., 562; *Sturges* vs. *Vanderbilt*, 73 N. Y., 384; *Greeley* vs. *Smith*, 3 Story, 657)."

The attachment bond given in that case is precisely the same as that sued on in the present case, and thus the Court of Appeals of New York has held that it does not cover a judgment en-

tered after the defendant corporation has ceased to exist.

A Statute of New Jersey provides as follows:

> "All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them and of enabling them to settle and close their affairs, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which they were established."

The Court says of these provisions (page 459):

> "Their effect was to continue the life of the corporation as to its capacity to prosecute and defend suits by or against it, * * * and to destroy its capacity and existence in all other respects and for all other purposes."

Within the holding of the *Sinnott* case, the action in the present case against the Illinois Surety Co. abated when it ceased to exist, and since it was continued for two years only for the purpose of defending suits, the judgment entered without appearance after the lapse of said two years was obtained without jurisdiction.

The same statute of New Jersey was before the Circuit Court of Appeals for the Second Circuit in *Held* vs. *Crosthwait*, 260 Fed., 613. There the Governor had issued a proclamation repealing the charter of the corporation, with other charters, for non-payment of taxes. Thereafter the directors held out the corporation as still in existence and entered into contracts in its name. The issue was whether they were personally liable on such a contract. After the con-

tract was made the corporation paid the taxes and charges and the Governor pursuant to the statute by proclamation reinstated the corporate existence, and this was held to be a defense by the majority of the court. ROGERS, *C. J.*, dissented, holding that such reinstatement was not a defense. There was an entire agreement, however, on the point that the corporation had ceased to exist pursuant to the statute and the proclamation of the Governor. WARD, *C. J.*, page 616, says:

> "We think it clear that the charter may be and by the statute is repealed by the Governor's proclamation without the necessity of any application to the courts. * * * Therefore the second proclamation of reinstatement must be held to relate to the first proclamation of repeal, and the corporation must be regarded as having continually existed so far as the state is concerned."

ROGERS, *C. J.*, page 626, says:

> "But it (the statute) fixed a time for the expiration of the charter and when that time arrived the corporation lost its power to act or to exist."

In *Martyne* vs. *Amer. Ins. Co.*, 216 N. Y., 196, CHASE, *J.*, says:

> "We have recently held in *Sinnott* vs. *Hanan* (214 N. Y., 454, 458) that where a statute relates to and regulates corporate existence and power it has extra territorial operation and effect, even as had the statute under which the corporation was created and which was a part of its charter and the law of its existence."

The Court quotes with approval from *Relfe* vs. *Rundle*, 103 U. S., 222, as follows (pp. 195-6):

> "Every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

The Court also quotes with approval from *Wulff* vs. *Roseville T. Co.*, 164 App. Div., 399, as follows (p. 196):

> "As commerce and commercial transactions between the citizens of the different states have increased, the tendency has been to extend the rule of comity where not incompatible with our own laws and with the rights of the citizens of our own state."

Said sections 3 and 4 above set forth of the act entitled "An act in regard to the dissolution of insurance companies," approved February 17, 1874, form the Illinois plan for the dissolution of insurance corporations by order of court restraining the corporation from doing business. Such an order and the lapse of one year causes the charter to expire and be extinct in all respects as if it had expired by its own limitation. Nothing further remains but to close its concerns. This certainly regulates the corporate existence and power, and has extra territorial effect, as stated in the *Martyne* case.

As said in the opinion of the trial court in the present case, the policy of the statute is to put a time limit on litigation outside the dissolution proceedings, and this is effected by the complete dissolution of the corporation with regard to defending actions three years after it has been restrained from doing business by a court order (*fols.* 219-220).

In *Sturges* vs. *Vanderbilt*, 73 N. Y., 384, a corporation's charter expired prior to the entry of

judgment against it in an action that was pending when the charter expired. The judgment was held void and open to collateral attack.

RAPALLO, *J.*, page 390, says:

> "But the principle upon which that class of cases rests is not applicable to a dissolution by expiration of the charter. The dissolution in such a case is declared by the act of the legislature itself. The limited time of existence has expired and no judicial determination of that fact is requisite. The corporation is *de facto* dead. (Citing cases.) Where the charter of a corporation is annulled by act of the legislature, the corporation is extinct and no judgment can be rendered against it. (Citing cases.) We have been referred to no authority holding a contrary doctrine."

In *Cyc.*, Vol. 10, page 1270, the ways in which a corporation may be dissolved are enumerated, and it is said:

> "There are five ways: (1) By the expiration of the term of existence granted by the legislature either in its charter, where it is organized under a special charter, or under its governing statute where it is organized under a general law."

Again at page 1314:

> "By the principles of the common law, in the absence of any saving statute, the dissolution of a corporation has the effect of abating all actions pending against the corporation at the date when the dissolution takes effect."

Again at pages 1316-17:

> "The necessary effect of the dissolution of a corporation is to abate all actions

> pending against it at the time of its dissolution, in the absence of a saving statute providing for the continuation of such actions. * * *
>
> A judgment rendered against the corporation after its dissolution, although in an action previously commenced, is not merely erroneous, but absolutely void."

The text cites among other cases, *Sturges* vs. *Vanderbilt*, 73 N. Y., 384; *McCulloch* vs. *Norwood*, 58 N. Y., 562; *Matter of Norwood*, 32 Hun., 196.

In *Blanchard* vs. *Gay Co.*, 289 Ill., 421, *Justice* DUNCAN says:

> "Appointing a receiver to take possession of the assets of a corporation and to distribute them is tantamount to dissolving the corporation by decree in equity."

In *Carr* vs. *Hamilton*, 129 U. S., 252, 32 L. Ed., 669, the issue was whether a debtor of an insolvent life insurance company might set off against such debt a claim on a life insurance policy issued to himself.

BRADLEY, *J.*, page 670, says:

> "It is difficult to see why this principle of justice should not apply to persons holding policies of life insurance in a company which becomes bankrupt and goes into liquidation. By that act the company becomes *civiliter mortuus*, its business is brought to an absolute end, and the policyholders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate *pro rata* in its assets."

In *Pendleton* vs. *Russell*, 144 U. S., 640, *Justice* FIELD says:

> "The judgment purports to be against the insurance company, but that company, at the time, had no legal existence. It had been dissolved and its franchises, rights, and privileges declared forfeited. * * * The judgment was therefore no more valid against a non-existing corporation than it would have been if rendered for a like amount against a dead man."

In that case the action was properly begun against the corporation, and the original judgment was duly obtained against it, but the original judgment was reversed on appeal, and pending the appeal the corporation was dissolved and a receiver appointed. The receiver employed counsel to argue the appeal from the original judgment and the same was reversed. It was held that no judgment could thereafter be rendered against the corporation because it had ceased to exist.

In *Thornton* vs. *Railway Co.*, 123 Mass., 32, the suit was for an equitable attachment, and was based on an alleged judgment obtained against the Railway Company in July, 1875. The judgment was held void because the charter of the corporation had been repealed before the judgment was entered, and the judgment was also rendered after the period of three years provided by statute for the continuance of the body corporate for the purpose of defending suits.

Gray, C. J., page 34, says:

> "Upon the repeal of the charter of the Marginal Freight Railway Company by the St. of 1872, c. 342, which was passed and took effect on May 6, 1872, the corporation was nevertheless, by virtue of the Gen. Sts. c. 68, Sec. 36, continued a body corporate for the term of three years afterwards, for the purpose of prosecuting and defending

> suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock. * * *
>
> No application having been made for the appointment of a receiver, the Marginal Freight Railway Company, at the expiration of the three years, ceased to have any such existence that a valid judgment could be rendered against it in an action at law."

In *Eagle Co.* vs. *Kelsey*, 23 Kan., 625, HORTON, C. J., says:

> "If we assume that the common law is in force in Indiana, then upon the expiration of the charter of the plaintiff, it ceased to exist for any purpose."

Upon this being shown a verdict for the plaintiff was set aside before judgment.

In *Hollingshead* vs. *Woodward*, 107 N. Y., 96, it was held that there was an *ipso facto* dissolution of the corporation. DANFORTH, J., page 101, says:

> "If a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights."

In *Deoppelmann* vs. *Illinois Surety Co.*, 25 Wash., 476) it was held that the Illinois Surety Co. was dissolved in this proceeding. HOADLY, J., page 476, says:

> "It appears that prior to the appointment of the receiver in this action (in Washington) a receiver had been appointed for appellant in its home state, Illinois, and by the laws there in force the receiver acquired absolute title to the property of appellant as fully as though he had been an assignee thereof, and was, in fact, a *quasi* assignee

or successor. *Republic Life Ins. Co.* vs. *Swigert*, 135 Ill., 150, 25 N. E., 680, 12 L. R. A., 328. It is respondent's contention that, because of appellant's non-existence it had no right to appear and defend, and that the proper procedure would be for the Illinois receiver to intervene and set up the defense interposed here by appellant. While we agree with respondent that appellant no longer has any existence, we do not agree with the conclusion derived therefrom that it is incumbent on the Illinois receiver to intervene."

Yates vs. *The People*, 207 Ill., 316, was a petition for a mandamus requiring the Superintendent of Insurance to issue a certificate of authority to transact insurance business. *Justice* MAGRUDER, page 326, says:

"It follows that the Act of 1874—providing that the charters of all insurance companies, which have ceased for the period of one year to transact the business for which they were organized, shall be deemed and held extinct in all respects as if they had expired by their own limitation—is fully applicable to the Continental Insurance Company. The latter company appears upon this record as having ceased for the period of one year to transact the business for which it was organized, and, therefore, under the Act of 1874, which was a general law passed after the Act of March 7, 1867, its charter must be deemed and held extinct in all respects as if it had expired by its own limitation."

In *Shore Line R. R. Co.* vs. *Me. Cent. R. R. Co.*, 92 Me., 476, the plaintiff's charter expired, but was extended three years for the purpose of prosecuting and defending suits. It was held that an action brought by it during the three year period

abated at the end of the three years. HASKELL, *J.*, page 482, says:

> "No part of the line had been constructed on that date (January 28, 1895) and its powers then became extinct. Its charter ceased to exist. It had expired by its own limitation. It was dead, except so far as sec. 24, C. 46, of R. S., continued its existence for three years, 'to prosecute and defend suits'; to settle and close its concerns; to dispose of its property; and to divide its capital.
>
> "This suit was commenced within three years, and, upon the expiration thereof, the defendant moved to dismiss the action, because the same abated for the want of a plaintiff. ° ° The plaintiff has no corporate existence and can neither recover judgment nor suffer one against itself. Its action has abated, and there is no one who can revive it."

In *Dundee Co.* vs. *Hughes*, 77 Fed., 855, a statute of Oregon provided that all corporations after their dissolution shall

> "continue to exist as bodies corporate for a period of five years thereafter if necessary for the purpose of prosecuting or defending actions, suits or proceedings, by or against them ° ° ° but not for the purpose of continuing their corporate business."

It was held that after the end of the five year period a corporation could not prosecute an action which it had begun before its dissolution, and that such action abated. GILBERT, *C. J.*, page 856 says:

> "At the expiration of that period it is the logic of the common law rule that the corporation is as absolutely defunct as it

would have been in the first instance had not its life been prolonged by the intervention of the statute. The Supreme Court of Massachusetts has held that a judgment recovered against a corporation after the expiration of a similar period of limitation is absolutely void. *Thornton* vs. *Freight Co.*, 123 Mass., 32."

In *Morgan* vs. *New York Nat. Bldg. Asso.*, 73 Conn., 151, real estate situated in Connecticut and owned by a New York corporation was attached in an action brought in Connecticut by a resident of that State. Pending the action the corporation was dissolved in an action subsequently begun in New York, and permanent receivers were appointed. It was held that the attachment and action in Connecticut abated because no judgment could thereafter be obtained against the dissolved corporation. BALDWIN, *J.*, page 153, says:

> "An attachment in a suit against a natural person is dissolved by his death, notwithstanding the entry of his administrator to defend, and a judgment duly rendered against the latter. * * * The same principle governs the disposition of attachments, where the defendant is an artificial person which is dissolved pending the action. * * * There can be no judgment or execution against the dead. * * * This is true alike as respects domestic and foreign corporations.
>
> "The State which grants a corporate franchise has exclusive and supreme power to withdraw it, whatever may be the effect of its so doing on property rights which may have been acquired under the laws of other governments."

In *Logan* vs. *Greenwich Trust Co.*, 144 App. Div., 372, aff'd 203 N. Y., 611, an action was begun

against a non-resident by levy of an attachment, but the defendant died before the summons was served. It was held that a judgment could not be entered against said deceased but the action should be revived against his administrator appointed at the place of his residence. INGRAHAM, *J.*, page 379, says:

> "The death of the original defendant prevented the continuation of the action or proceeding as against him."

The law is well stated in a case note in 32 L. R. A. N. S., 447, as follows:

> "The doctrine is well established that in the absence of statutory regulation, the expiration of corporate life by lapse of time or decree of dissolution works an abatement of pending actions at law by or against it, the reason being that its existence as a legal entity is ended, and therefore a judgment subsequently rendered will be void." (Citing cases).
>
> "So, a decree of dissolution of a corporation, rendered in the state of its domicil, abates actions pending by or against it in another state." (Citing cases) * * *
>
> "Cessation of business by a building and loan association, and sale of its claims for unpaid loans, amounts to a dissolution which will abate a pending action brought by it. *Van Pelt* vs. *Home Bldg. & L. Assoc.*, 87 Ga., 370." * * *
>
> "And the surrender of a corporate charter and its acceptance by the legislature will abate an action pending against the corporation. *Greely* vs. *Smith*, 3 Story, 657, Fed. Cas., No. 5,748." * * *
>
> "A pending proceeding by attachment of corporate property is abated by a decree dissolving the corporation." * * *
>
> "It has been held in New York that as

the dissolution of a corporation in the state of domicil abates pending actions against it in another state, a judgment subsequently rendered is void and cannot be enforced in the former state, on the ground of comity nor the provision of the Federal Constitution requiring full faith and credit to be given to the judgments of other states, notwithstanding a statute thereof permits judgment to be rendered in pending actions against corporations after dissolution."

Citing: *Rogers* vs. *Adriatic F. Ins. Co.*, 87 Hun., 384;

People vs. *Mercantile Co.*, 65 App. Div., 306.

"Where it is provided by statute that the termination of the existence of a corporation will not prevent the maintenance of subsequent actions by or against it within a designated time, the expiration of such period will work an abatement of pending undetermined actions which have not resulted in judgment."

Citing: *Maine R. Co.* vs. *Maine C. R. Co.*, 92 Me., 476;

Thornton vs. *Marginal R. Co.*, 123 Mass., 32;

Bank vs. *Wrenn*, 3 Smedes & M., 791;

Dundee Co. vs. *Hughes*, 77 Fed., 855, and 89 Fed., 182.

II.

The Illinois Surety Company was subject to the Illinois statute regarding the dissolution of insurance corporations.

The Illinois Surety Company was organized in 1905 under the laws of Illinois (Bill in dissolution proceedings, found to be true by order of April 19, 1916, *fols.* 500, 542). The statute of

Illinois then applying to the organization and regulation of surety corporations was that approved April 17, 1899 (L., 1899, p. 260; Hurd's Rev. Stat., 1917, Part 1, page 739).

Section 14 of said statute provides:

> "Such companies shall also be subject to the provisions and requirements of an act entitled, 'An Act in regard to the dissolution of insurance companies,' approved February 17, 1874, in force July 1, 1874."

Sections 3 and 4 of the act of February 17, 1874, in regard to the dissolution of insurance companies, are quoted above at pages 6-7 of this brief. They are printed as sections 13 and 14 of Chapter 73 (Insurance law) of Hurd's Revised Statutes of 1917, Part 1, page 1680. Hurd's Revised Statutes are a private revision which follows the arrangement and chapters of the public Revised Statutes of 1874.

III.

The Illinois Surety Company became dissolved for all purposes on April 18, 1919.

The decree of April 19, 1916, restrained the corporation permanently and indefinitely from transacting the business for which it was organized. This operated under section 3 of the act of February 17, 1874, and caused the charter to expire in all respects by its own limitation. By section 4 of said act the corporation was continued a corporate body for two years thereafter for the purpose of defending suits. At the end of two years or on April 18, 1919, the corporation ceased to exist for all purposes, by the expiration of its

charter. The plaintiff's assignor could not thereafter obtain a valid judgment against the Illinois Surety Company as is shown from the foregoing cases. Accordingly, the Illinois Court on April 18, 1919, entered the order directing its receiver to make no further defense of the corporation in said action, and directing Mackey to file his claim before the master (*fol.* 575).

IV.

Answering the brief for Petitioner.

It is clear that the decisions of the courts of Illinois, and the decision of the Illinois Court in this instance, are binding here on the construction of the Illinois statute regarding the dissolution of insurance companies. The power of the Illinois Court to restrain the Illinois Surety Company from doing business, and the force and effect of such restraining order under the statute, are primarily matters for the Illinois Court to decide. It is, moreover, obvious that the Illinois Court was acting under the Illinois statute in entering the decree restraining the corporation from further transacting business, and has decided that the Illinois Surety Company expired for all purposes on April 18, 1919, pursuant to sections 3 and 4 of the Act in regard to the dissolution of insurance companies, quoted above. On that day it directed the receiver to discontinue any further defense of the Illinois Surety Company (*fol.* 575) on the obvious ground that the company had ceased to exist and any judgment obtained could not be binding.

THE ACT UNDER WHICH THE ILLINOIS SURETY COMPANY WAS FORMED TREATS SURETY COMPANIES VIRTUALLY AS INSURANCE COMPANIES, AND PROVIDES SPECIFICALLY THAT THEY SHALL BE SUBJECT TO THE SPECIAL ACT IN REGARD TO THE DISSOLUTION OF INSURANCE COMPANIES.

The act under which the Illinois Surety Company was formed is entitled "An Act to provide for the organization, management and regulation of Surety Companies" (approved and in force April 17, 1899; L. 1899, p. 260; Legal News Ed., p. 107), which is contained in Hurd's Revised Statutes, Part 1, page 739 and following. Hurd's Revised Statutes are a private revision and the grouping of the statutes in chapters is his, except so far as he attempts to follow the style and arrangement of the Public Revision of 1874. In referring to the sections of this act we will follow the numbering of the act itself rather than the numbering of Mr. Hurd. This act provides:

That the certificate of incorporation shall be filed with the Insurance Superintendent, who shall examine and approve and record it (Secs. 2, 3).

That the corporators shall file a report of capital paid in with the Insurance Superintendent, whose appointees shall examine and approve it, and that such companies may invest in such securities as are lawful for life insurance companies (Sec. 5).

That every such corporation before commencing business shall make a deposit with the Insurance Superintendent in securities to be examined and approved by him (Sec. 6).

That the Insurance Superintendent shall issue a certificate of deposit, and a certificate of organization, which shall be recorded, and also a certificate of authority to do business (Sec. 7).

That the Insurance Superintendent shall make examinations of the condition of such companies (Sec. 9); and issue to agents of such companies certificates authorizing them to solicit business (Sec. 10); and when such a company shall cease to do business the Insurance Superintendent shall notify claimants to bring suit against it in order to avail themselves of the deposit with the Insurance Superintendent (Sec. 13); that alterations and amendments of the charter shall be subject to the examination and certificate of the Insurance Superintendent (Sec. 15).

It is thus noticeable that such corporations are treated in Illinois as Insurance Corporations, with respect to organization qualification and examinations and control by the state.

The statute also provides:

> "Corporations formed under this act shall be subject to all laws of this State governing corporations for pecuniary profit, as provided for in an act entitled, 'An Act concerning corporations,' approved April 18, 1872, in force July 1, 1872, and amendments thereto, in force July 1, 1897, and to the duties thereof, and shall have the powers thereof, so far as the *same are not inconsistent with the provisions of this act.*
>
> "Such companies shall also be subject to the provisions and requirements of an act entitled, 'An Act in regard to the dissolution of Insurance Companies,' approved February 17, 1874, in force July 1, 1874."

Surety Companies are thus made expressly subject to the Act in regard to the dissolution of Insurance Companies, Sections 3 and 4 of which are set forth above, and they expressly provide that the charter of the corporation shall in all respects expire one year from the date of the order

restraining the corporation from doing business. Thereafter under section 4 the body corporate was extended two years and no more for the purpose only of prosecuting and defending actions.

The petitioner relies primarily on sections 10, 11 and 12 of "An Act concerning corporations," approved April 18, 1872, in force July 1, 1872, and quotes these sections in full at page 39 of his brief.

1. In the first place these sections do not apply to insurance companies including surety companies. The statute providing for the organization and regulation of surety companies treats them virtually as insurance companies and makes them expressly and specifically subject to the act in regard to the dissolution of insurance companies. This is the specific intent and the prevailing one. Said sections 10, 11 and 12 have never been held in Illinois as applicable to the dissolution of insurance companies including surety companies, and the cases of the dissolution of ordinary business corporations cited by petitioner have no application. Said "Act concerning corporations" expressly excludes Insurance companies from its application. Section '1' thereof provides:

> "That corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance," etc.

There are special acts in most states applying to the dissolution of insurance companies including surety companies and these acts put a limit on the right to maintain an action against the company after insolvency is adjudged.

2. Doubtless the Illinois Surety Company was subject to the laws governing the duties and

powers of business corporations, so far as the same *were "not inconsistent" with* the act under which it was organized, and as set forth in the act concerning business corporations approved April 18, 1872. The clause relied on by petitioner means nothing more. But the act providing for the organization and regulation of surety companies specifically makes them subject as to dissolution to the act in regard to the dissolution of insurance companies. The clauses 10, 11 and 12 of the act concerning corporations *are inconsistent* with the act in regard to the dissolution of insurance companies, and with the act to provide for the organization of surety companies, and are hence not applicable. Said sections 3 and 4 of the act in regard to the dissolution of insurance companies are expressly made applicable to a surety corporation and are *inconsistent* with sections 10, 11 and 12 of said act concerning corporations approved April 18, 1872.

Petitioner argues (pp. 29-30) that there is no material difference between sections 10, 11 and 12 of the Act concerning corporations and sections 3 and 4 of the Act in regard to the dissolution of insurance companies. The difference is apparent as soon as the issue is raised. The said section 11 of the act concerning corporations provides expressly that the dissolution for any cause of any corporation created under the act "shall not take *away or impair any remedy* given against such corporation * * * for any liabilities incurred previous to its dissolution." This statute has expressly the same force as the statute in New Jersey involved in *Sinnott* vs. *Hanau*, 214 N. Y., 454. The Illinois Courts hold that under it the corporate existence of an ordinary business corporation is extended indefinitely for the purpose of being sued. The cases cited by petitioner

were decided under such statute and have no application here.

On the other hand, said sections 3 and 4 of the Act in regard to the dissolution of insurance corporations provide expressly in substance—(1) that when an insurance corporation in obedience to a decree of any court, shall cease for one year to do business, its charter shall be held extinct in all respects, as if expired by its own limitation; and (2) this section (§3) shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors; and (3) the company shall be continued a body corporate for two years and no more thereafter for the purpose only of prosecuting and defending suits.

3. The language of said section 10 relied on by plaintiff-in-error, provides:

> "All corporations *organized under this* law whose powers have expired," etc.

The Illinois Surety Company was not organized under this law for the organization of business corporations other than insurance and surety corporations.

4. The construction of the Illinois Court is binding here as to the law of Illinois and it was there held in this case that the receiver should discontinue any further defense of the corporation, on the obvious ground that judgment entered after April 18, 1919, would not be entitled to faith and credit. This prevents the defendant in this action from being subrogated to any rights in Illinois under the so-called judgment sued on. A duly recovered judgment in New York must also be a judgment in Illinois.

In *Malicki* vs. *Bulkley, et al.*, Receivers, 107

Ill. App., 595; aff'd 206 Ill., 249, action was brought in Michigan against an Illinois life insurance company, and judgment was entered in Michigan against said Company after a decree had been made in Illinois dissolving the corporation and appointing receivers for it on December 19, 1900. It was held that the judgment was properly entered against the life insurance company, because it had been entered within two years from the date when the corporation ceased to exist for purposes other than being sued. WATERMAN, *J.*, page 598, says:

> "An examination of the statute discloses that the decree of dissolution entered against the Chicago Guaranty Fund Life Society, did not completely terminate its existence, but that it continued to be a living entity, a body corporate for a term of two years after said decree, for the purpose of prosecuting and defending suits and enabling it gradually to close up its business.
>
> "The judgment obtained by appellant, having been rendered within said two years, was and is, under the statutes of this state, a valid and binding judgment."

THE CASES CITED BY THE PETITIONER ARE ALL DISTINGUISHABLE.

In *Life Ass'n* vs. *Fassett*, 102 Ill., 315, cited by petitioner (page 33), lands owned by a Missouri corporation had been attached in Illinois before an order dissolving the corporation was made in Missouri.

The order dissolving the corporation provided (page 329) that *suits were authorized to be brought and defended* in the name of the corporation. The lien on the lands persisted. The order of dissolution did not dissolve the corpora-

tion for the purpose of defending actions. The statute in regard to the dissolution of Illinois Insurance Corporations was not under consideration.

Justice MULKEY, page 325, says:

> "It is not denied, or even questioned, that by the common law a corporation which has been dissolved absolutely, for all purposes whatsoever, stands upon the same footing as a dead person with respect to any power in the courts to enter a valid judgment against it."

In *Singer & Talcott Co.* vs. *Hutchinson*, 176 Ill., 48 (Brief of petitioner, pages 31-2), the statute regarding the dissolution of insurance companies was not involved. The same is true of *Central Stock Company* vs. *Pine Tree Co.*, 140 Ill. App., 471, and *Graham Morton Co.* vs. *Owens*, 165 Ill. App., 100, relied on by petitioner at page 31.

In *Ward* vs. *Farwell*, 97 Ill., 593 (Brief of petitioner, page 22), the Act in regard to the dissolution of insurance companies was held constitutional, and it was held that the stockholders were not parties to a bill for the dissolution of such a corporation, and that where the circumstances calling for a decree restraining the corporation from doing business are admitted, no issue is raised which requires a hearing. *Justice* MULKEY, page 619, says:

> "In the present case, as the facts in the petition were admitted, the necessity of a hearing was obviated; but the court should, before appointing the receiver, have entered a final order or decree upon the merits, either dissolving the corporation or

> restraining it from the further continuance of its business. But the failure to do so was merely error, which did not at all affect the jurisdiction of the court, and hence is of no importance in the present case—for if the court had jurisdiction of the subject-matter of the suit and of the parties, the regularity of the receiver's appointment cannot be inquired into in the present suit."

The Court there speaks of an order restraining the corporation from doing business as the equivalent of an order dissolving the corporation, and as clearly laying the foundation for the appointment of a receiver to liquidate the assets. In the present case the court did enter a decree restraining the corporation from doing any further business and such decree was final on that point.

THIS IS NOT A CASE OF FORFEITURE OF THE CHARTER, BUT THE EXPIRATION OF IT, UNDER THE STATUTE UNDER WHICH THE CORPORATION WAS ORGANIZED, AND THE JUDICIAL ACTION OF THE COURT IN ITS DECREE RESTRAINING THE CORPORATION FROM FURTHER PROSECUTING ITS BUSINESS.

Petitioner, pages 28-9, argues that this is a case of forfeiture of the charter and that in such cases there must be some judicial action to take advantage of the forfeiture.

There was no forfeiture of the charter of the Illinois Corporation. Said section 3 of the act in regard to the dissolution of insurance companies expressly provides that the charters

> "shall be deemed and held extinct in all respects, as if they had expired by their own limitation,"

when the corporations have ceased in obedience

to the decree of any court, for the period of one year, to transact the business for which they were organized. There is no forfeiture involved, but the expiration of the charter pursuant to the statute and the decree, and according to the Illinois law and procedure. Moreover, there is ample action by the court in entering the restraining decree. It was solely pursuant to this plan of the statute that the restraining decree of April 19, 1916, was made. Otherwise, the order appointing the receiver would have sufficiently restrained the corporation from doing business.

In *Matter of Brooklyn Railroad Co.*, 106 App. Div., 240, aff'd 185 N. Y., 171, a statute provided that if a railroad corporation should not begin and complete the construction of its road within a certain period, "its corporate existence and powers shall cease." It was held that this provision was self-executory, and in such a case caused the existence of the corporation to cease in all respects without any action either judicial or otherwise. The statute provided:

> "If any domestic railroad corporation shall not, within five years after its certificate of incorporation is filed, begin the construction of its road, and expend ten per centum of the amount of its capital, or shall not finish its road and put it in operation within ten years from the time of filing such certificate, its corporate existence and powers shall cease."

WILLARD BARTLETT, *J.*, page 244, says:

> "As the latter statute was held by the Court of Appeals to be self-executing in the case cited, so the 1st clause of Section 5 must also be regarded as a provision which executes itself."

A similar holding was made in *Matter of Brooklyn, etc., Railway Co.*, 72 N. Y., 245, where the statute provided that in certain events which happened, "its corporate existence and powers shall cease."

A similar holding was made in *Brooklyn Transit Co.* vs. *City*, 78 N. Y., 524, where the statute provided that unless one mile of railroad should be laid within three years after the act took effect, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated." The provision was held to be self-executing.

Section 36 of the General Corporation Law of New York provides:

> "If any corporation, except a railroad, turnpike, plank-road or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its *corporate powers shall cease.*"

It is held that this statute is self-executory. In *People* vs. *Stilwell*, 157 App. Div., DOWLING, *J.*, page 843, says:

> "The statute is self-executory and no action or judicial procedure was needed to declare or complete the loss of its corporate powers."

In accord is Opinion Public Service Commission (1916), 11 St. Dept. Rep., 416.

THE AUTHORITY OF THE RECEIVER TO DEFEND ACTIONS AGAINST THE ILLINOIS SURETY COMPANY REFERS MERELY TO THE PERIOD OF THREE YEARS DURING WHICH ACTIONS COULD BE PROSECUTED AGAINST IT UNDER THE STATUTE.

(Brief of petitioner, pages 32-4).

The order appointing the receiver authorized him to defend actions against the corporation (*fol.* 550). This was, of course, highly necessary and proper during the period of three years from the restraining order. It has relevance to this period and is not an authority for suing the corporation after the period of three years has elapsed.

The Court in fact on April 18, 1919, directed the receiver to discontinue any further defense of the corporation in the action brought by Mackey, which direction was pursuant to the statute (*fol.* 575).

In the case of *Life Ass'n* vs. *Fassett*, 102 Ill., 315, cited by petitioner (page 33) the corporation was organized under the laws of Missouri and the decision has no application to the statute here involved. In that case the decree of dissolution entered in Missouri in effect continued the existence of the corporation for the purpose of suing and being sued.

In the present case the statute expressly states when the existence of the corporation shall expire. The right of the receiver to defend in the name of the corporation during the period of three years while the corporate existence remained for the purpose of defending actions clearly does not overrule the statutory time when the corporate existence ceases. Then at the end of said period of three years the court expressly directed the receiver to discontinue any further defense of the corporation.

In *Pease* vs. *Rathbun-Jones Co.*, 243 U. S., 269, cited by petitioner, the judgment was entered against the corporation within the three years

period after dissolution as provided by the statute of Texas. The same statute also made the president and directors, trustees for creditors and stockholders of a corporation after its dissolution. In that case also, the corporation actually prosecuted the appeal after it had been dissolved. The Court found that the statute of Texas "carefully avoided" the abatement of actions by dissolution.

The other cases cited by petitioner also arose under state statutes and proceedings which were essentially different, and where the action was prosecuted against the corporation while its existence was expressly continued, instead of after its existence had expressly ceased, as in the present case.

It is apparent that an enormous judgment has been rendered against the Illinois Surety Company without any trial of the issues on the merits, and on a claim which bears all the indications of being colorable only. This judgment also far exceeds the amount demanded in the complaint.

The original complaint was for $7,498.02 (*fol.* 243). The amended complaint is for $23,000 (*fol.* 290). The judgment is entered for $37,041.95 (*fol.* 386), which bears no relation to the demand in the complaint, and has apparently no support in law. The counterclaim of the Illinois Surety Company for securities and assets converted by Mackey amounting to $153,914.56 (*fol.* 325), was, of course, not presented to the referee. The so-called judgment is a nullity in Illinois and is nothing to which the defendant herein can be subrogated.

The claim of Mackey was delayed and never pressed as a live claim, until after defendant became dissolved for all purposes and appearance for it withdrawn.

An attempt is being made to entrap the present defendant by what is only a colorable judgment, where no defense was made because the defendant was civilly dead.

It is argued for petitioner that the defendant herein is a surety company, and that its defense is on technical grounds. The defendant of course never undertook against any judgment which should be entered after the Illinois Surety Company was dissolved, and so far is its defense from being technical, that the entry of the judgment without opposition would, under the contentions of the petitioner, amount to a gross fraud on the defendant.

V.

The present is not a proper case for a writ of certiorari.

Not only was the case rightly decided and not in conflict with any other decisions, but it was decided under the provisions of the Statute of Illinois in regard to the dissolution of insurance corporations. Said statute has no general application, and the application of the laws of a particular state is not of "such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them" by writ of certiorari from the Supreme Court (*Ex Parte Woods*, 143 U. S., 202).

This branch of the jurisdiction will be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." (*Am. Const. Co.* vs. *Jacksonville, etc., Ry. Co.*, 148 U. S., 372.)

Where a writ of certiorari has been granted and it appears upon the hearing that no matter of far reaching importance is involved, the writ will be dismissed without this Court passing upon the merits. (*United States* vs. *Rimer*, 220 U. S., 547.)

In *Forsyth* vs. *Hammond*, 166 U. S., 514, *Justice* BREWER says:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands its exercise."

VI.

The petition should be in all respects denied, with costs and disbursements.

Respectfully submitted,

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October, 1921.

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Supreme Court of the United States

OCTOBER TERM, 1922.

NO. 92.

JOHN EWEN,
Petitioner,

against

AMERICAN FIDELITY COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER, PLAINTIFF BELOW.

POINT I.

Statements in the respondent's brief that Mackey unduly delayed the prosecution of his suit against the Illinois Surety Company, and that he did not have a meritorious cause of action, are without support in fact or in the record.

Such statements which appear repeatedly in the respondent's brief have no relevancy to the issues involved in this action. If made with the design of prejudicing this Court against the petitioner, and thereby affecting its decision, they are highly improper. We should disregard them entirely were it not for the fact that the opinion of the Circuit Court indicates that, when made below,

they may have had some weight and influence in its decision. They are absolutely without support in the record. We refer to a few of them as follows:

> "Mackey had been the agent of the Illinois Surety Company in New York and his agency had been terminated and he and the Company were making enormous claims against each other, and the Company had Mackey indicted for converting its property and securities to his own use" (Respondent's Brief, p. 3).
>
> "Said action brought by Mackey was apparently a back fire against the claims of the Illinois Surety Company against him. . . . Said indictment was dismissed and Mackey delayed his aforesaid action and did not seriously prosecute the same until he learned from the order of the Illinois Court of April 18, 1919, that no further defense of the corporation would be made" (Respondent's Brief, p. 4).
>
> "Also the claim of Mackey was delayed and never pressed as a live claim until the Illinois Surety Company had ceased to exist" (Respondent's Brief, p. 5).
>
> "It is apparent that an enormous judgment has been entered against the Illinois Surety Company by default and on a delayed claim which bears all the indications of being only colorable and a back fire against the claims of the Illinois Surety Company for money that had been converted and stolen" (Respondent's Brief, p. 43).
>
> "The claim of Mackey was delayed and was never prosecuted as a live claim while the corporation continued to exist for defending actions. Then when further defense was forbidden by the Illinois Court Mackey at once obtained a colorable judgment in an attempt to entrap the present defendant" (Respondent's Brief, p. 43).

Reference to Mackey's indictment is obviously improper. It was pleaded in the answer, and was stricken out on motion on the trial (Record, pp. 21, 22). It was procured after Mackey had been trying for months to obtain a settlement of his claim for commissions, on the very day on which he instituted his suit, and was subsequently dismissed by the District Attorney on his own motion (Record, p. 22). There is certainly not a word in the evidence to indicate that the indictment had any basis.

The statements that the claim was never prosecuted as a live claim until after the receiver had discontinued his defense, that it was purposely delayed by Mackey, and that it was not a just claim, are absolutely negatived by the record.

Mackey's claim was for commissions upon premiums collected after the termination of his agency, and was based upon written contracts providing for such commissions, which were admitted by the answer of the Illinois Surety Company, and found by the referee (Record, pp. 57, 58, 72).

The counterclaims alleged by the Illinois Surety Company, aggregating over $153,000 were explicitly denied in Mackey's sworn reply (Record, pp. 64, 65). If these counterclaims had been valid it would seem that the Illinois Surety Company would have wished to have had them determined as speedily as possible. Instead, when Mackey's first action was brought, in which these counterclaims were also alleged, it filed a petition for removal of the cause to the United States District Court in Illinois, and without notice had the bond approved, and by its opposition to the remand, delayed the action for a year (Record, p. 25;

Mackey v. *Illinois Surety Co.*, 172 A. D., 966). Immediately upon the remand being granted, the issues in the first action were referred to a referee, and a trial had before him in which all evidence on both sides was completed and that action together with the attachment action were submitted for decision in the summer of 1918, which was nearly a year before the receiver attempted to discontinue the defense (Record, p. 25). Since the issues in action No. 2 (in which the attachment bond sued on was given), could not be decided until after the determination of the issues in action No. 1, they were, by a stipulation, dated November 14, 1917, and signed by the respondent herein, the surety on the attachment bond (Record, p. 52), referred to the same referee, it being at the same time provided that amended pleadings increasing the demand be served. Any delay in the trial before the referee was caused by the receiver of the Illinois Surety Company, who had undertaken its defense, to such an extent that the referee had on one occasion directed that the case be deemed closed, subsequently granting the receiver additional time to put in further testimony (Record, p. 26). The referee died after the submission to him (Record, p. 26), or the case would have been decided before the date on which the respondent claims that the Illinois Surety Company was dissolved.

Mackey did, therefore, prosecute the claim diligently as a very live claim and had done all that he could to bring about a determination on the merits.

After the referee's death, so far from attempting or desiring to obtain a judgment by default, he offered to submit the same record either to the

court or to another referee, and it was the receiver of the Illinois Surety Company who refused to do so (Record, p. 27; Plff's. Exh. 7, letter of Kellogg & Rose, dated September 25, 1918, Record, p. 92; letter of Kellogg & Rose, dated February 5, 1919, Record, p. 94).

It also appears that from the death of the referee until the date of the order obtained by the receiver instructing him to discontinue the defense, Mackey's attorneys were urging the appointment of a new referee by agreement, and the delay was due to and at the request of the receiver's attorneys (Plff's. Exh. 7; Record, pp. 92 to 95).

Although Mackey could not compel the receiver to defend if unwilling, he gave the receiver every opportunity to do so; notice of all proceedings thereafter being given not only on the receiver's New York attorneys, but in addition to the receiver in person (Record, pp. 32, 69, 70), and even after the matter had been noticed for trial before the new referee, Mackey's attorneys agreed with the receiver's attorneys to adjourn the trial to give the receiver an opportunity to defend if he should desire to do so, in view of the existence of the bond now sued upon (Record, p. 28).

Referring to the proceedings before the new referee the respondent's brief makes the following statements:

> "Petitioner did not put into the record the minutes of Mackey's testimony before the referee which are referred to in the referee's report on which said judgment was entered (fols. 123, 124), and the reason is, as may be inferred, that said testimony of Mackey, the only witness, was wholly insufficient and laid no proper foundation for said report" (Respondent's Brief, p. 4).

Also:

> "The testimony previously taken was not used on this new reference (fol. 123). The minutes of the testimony of Mackey, the only witness before the new referee, were filed with the judgment roll, but were not offered by the plaintiff herein in support of said judgment, for the obvious reason that they would not be helpful to the plaintiff's case, said testimony being entirely insufficient and being no proper basis for the judgment rendered" (Respondent's Brief, p. 14).

The same testimony and exhibits used before the deceased referee were offered before the new referee (Record, p. 32).

There is no evidence in the record to support the respondent's statement that the minutes of testimony were filed with the judgment roll, and not being in evidence the statement that they were insufficient to support the judgment is unwarranted and is not in fact true.

The referee's report is conclusive that the evidence supported the findings on which the judgment was made (Record, p. 72). Moreover, if the respondent had deemed the testimony insufficient to support the judgment, it must be presumed that it would have offered it in evidence.

If any inference is to be drawn from the actions of the parties, it is that the counterclaims interposed by the Illinois Surety Company and its receiver were purely colorable and for the purpose of staving off the payment of Mackey's claim as long as possible. Otherwise, by discontinuing the defense, the receiver relinquished a valid affirmative claim for over $150,000, which it was his duty to recover for the insolvent estate. The order directing him to discontinue further defense

of the actions brought by Mackey (Deft's. Exh. B 7; Record, p. 113), was made upon his own petition. It was not made, as respondent would infer in its brief, because his powers had ended, for it recites:

> "it appearing to the Court *that the interests of the creditors of the Illinois Surety Company will be best subserved* by directing the receiver to take no further action relating to either of the cases mentioned."

The interests of its creditors could hardly be subserved by the relinquishment of a valid claim for $150,000.

If any further inference is permissible as to these counterclaims and the reasons for their assertion, it is that in order to make it appear that the Illinois Surety Company was solvent, it had carried on its books and included in its statements of assets this very large unfounded claim against Mackey or the New York agency. Since it could not consistently recognize Mackey's claim for commissions and continue to do so, it was to its interest to delay, and if possible to prevent any final determination of his claim. When its failure was imminent, those in charge of its affairs, according to the petition of Mr. Potts, the Illinois Superintendent of Insurance,

> "fraudulently entered into pre-arrangement to have one of their number appointed receiver, without giving the Insurance Superintendent or any other public officer or any creditor notice of the proceedings."

Evans v. *Potts*, 204 Ill. App., 212.

The receiver, who was its president's son (Record, p. 39), thereafter delayed the trial of the action as long as possible, and with that end in

view, after the death of the first referee, refused to allow the action to be submitted and determined on the record already taken. At the expiration of the period, which it was evidently assumed would bar further prosecution of Mackey's claim, and to prevent a formal adjudication of the invalidity of its claims against him, the order was obtained, which instructed the receiver to discontinue further defense.

If this is not the true explanation, then there is no reasonable explanation why the receiver should have abandoned this huge claim against Mackey after all the labor and expense of the trial had been completed, when, to establish it, it would have been only necessary to have accepted Mackey's offer to submit the record already taken to the court or to the new referee.

POINT II.

The provisions of the General Corporation Act of Illinois apply to corporations organized under the Illinois Surety Companies Act.

"An Act Concerning Corporations" approved April 12, 1872, provides:

> "§12: The dissolution for any cause whatever of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liabilities incurred previous to its dissolution."

The respondent does not, and cannot question, if Section 12 applies to corporations organized under the Surety Company Act, even if the Illinois

Surety Company had been dissolved prior to the entry of the judgment in the attachment action, that that action did not abate. It claims in its brief that the provisions of the General Corporation Act do not apply for two reasons:

1. Because Surety Companies are treated as insurance corporations and are therefore governed solely by the provisions of the acts relating thereto.

2. Because Surety Companies are made subject to "An act in Regard to Dissolution of Insurance Companies," approved April 17, 1874, and that act is inconsistent with Section 12 of the General Corporation Act.

(1) If the Illinois Surety Company were an insurance corporation, which it is not, it would still be subject to Section 12 of the General Corporation Act.

Referring to Section 12 of the General Coroporation Act, the Supreme Court of Illinois, in *Evans v. Illinois Surety Company*, 298 Ill., 101, at p. 107, said:

> "this court, in decisions already rendered, has assumed that the provisions of the general Incorporation act in this regard apply to insurance companies."

Further, the claim that the provisions of the General Incorporation Act do not apply to surety companies disregards the express language of the act under which they are organized, which provides:

> "§14. Corporations organized under this act shall be subject to *all laws of this State* governing corporations for pecuniary profit, as provided for in an act entitled 'An Act concerning corporations,' approved April 12, 1872,

* * * so far as the same are not inconsistent with the provisions of this act."

A similar claim made in *Evans* v. *Illinois Surety* 298 Ill., 101, was disposed of by Mr. Justice Carter in his opinion at pages 106 and 107, as follows:

> "It is argued by counsel for appellant that the provisions of the act concerning corporations for pecuniary profit cannot be applied to a surety company, because it is an insurance company. * * * In making this argument, counsel seems to have overlooked the long settled doctrine of this and other courts that it is a familiar legislative process to incorporate one statute into another by reference; that 'it is a method of legislation which is frequently followed and has uniformly been held to be free from constitutional objections. The effect of such reference is the same as though the statute, or the provisions adopted had been incorporated bodily into the adopting statute.' (*People* v. *Crossley*, 261 Ill., 78). This court has also said that 'whenever an act of the legislature confers powers which are recited in another act, the act to which reference is made is to be considered and treated as if it were incorporated into and made a part of the act which contains the reference.' *Zeman* v. *Dolan*, 279 Ill., 295; *People* v. *Stitt*, 280 id., 553.
>
> "As already stated the present Surety act under which this surety company was organized became a law in 1899, and the general incorporation act regarding corporations for pecuniary profit was passed in 1872. The legislature without question, by the latter act, intended to incorporate the provisions of the Incorporation act of 1872 into and as a part of the provisions of the Surety act of 1899, and so *under the decisions of this court there can be no question but that the provisions of the general Incorporation act heretofore quoted*"

> *and all of its applicable provisions apply to corporations organized under the Surety Act;* and this court in decisions already rendered has assumed that the provisions of the general Incorporation act in this regard apply to insurance companies." (Italics ours.)
>
> *Sections 10 and 12.

(2) The objection that Section 14 of the General Incorporation Act cannot apply because inconsistent with the provisions of the Act in relation to dissolution of insurance companies, is equally without merit.

Section 14 of the Surety Company Act makes *all* provisions of the General Corporation Act applicable "so far as the same are not inconsistent with the provisions *of this act.*" There is no provision in the Surety companies Act relating to dissolution, and, therefore, there is in it nothing inconsistent with the provisions of Section 12 of the General Corporation Act.

The respondent assumes that if Section 12 of the General Corporation Act is inconsistent with any provision of the "Act in regard to the dissolution of insurance companies," it cannot be applied to surety companies.

The Surety Company Act does not say so, nor has the respondent cited any authority so holding. The Surety Company Act in Section 14 says:

> "Such companies shall *also* be subject to the provisions and requirements of an act entitled 'An Act in regard to the dissolution of Insurance Companies,' approved February 17, 1874, in force July 1, 1874."

This is an addition to, not a subtraction from the powers already given. There is, however, nothing in the provisions of the dissolution act inconsistent

with the General Corporation Act so far as they relate to the continuance of corporate life for purposes of suit. In fact, the Insurance act in some respects prolongs the corporate life after dissolution to a greater extent that does the General Corporation Act.

Section 3 of the Insurance Company dissolution act contains a provision for fixing by decree after dissolution "the time within which such companies shall close their concerns." In other words, despite formal dissolution, the corporate life continues until such time has been fixed.

Section 4 which follows does not contain *a limitation* on this time, but provides that in case of dissolution they shall "*nevertheless* be continued bodies corporate for the term of two years" etc. In other words, if the time fixed under Section 3 for the closing of concerns should be less than two years, they are *nevertheless* and despite such limitation continued bodies corporate for the longer period.

The respondent also erroneously assumes that the expiration of the two-year period referred to in Section 4 of the insurance dissolution act results in the abatement of pending suits. The Illinois courts have held to the contrary in construing Section 10 of the General Incorporation Act (providing for the continuance of corporate life "during the term of two years for the purpose only of collecting the debts due said corporation"), which has the effect of limiting the power *to commence suits* to a period of two years, by holding that an action commenced within that period does not abate upon its expiration.

Graham & Morton Trans. Co. v. *Owens*, 165 Ill. App., 100.

POINT III.

The Illinois Law requires the entry of a final decree in order to effect dissolution.

The respondent contends that Section 3 of the act for dissolution of insurance companies does not require a final decree restraining the corporation from transacting business in order to set the one-year period running, but that where the corporation admits the allegations of the petition, the appointment of the receiver and the entry of an order restraining the doing of business until further order of the court, is a final decree adjudicating all matters.

The Illinois courts in construing a similar provision of the General Incorporation Law have held that the cessation of business which will result in a forfeiture must be pursuant to a final decree and not merely the result of a temporary restraining provision.

I. E. Hill Co. v. *Cleary*, 134 Ill. App., 88.

The courts of Illinois have also passed upon the necessity for the entry of a final restraining order in the dissolution proceedings, relating to the Republic Life Insurance Company brought by the Auditor of the State under Section 1 of the Insurance Dissolution Act. The Republic Life Insurance Company filed an answer admitting insolvency and an order restraining the corporation from transaction of business until further order of the court and appointing a receiver was made on the petition and answer. Section 5 of the Insurance Company dissolution act provides that when "the corporation is restrained from further prosecution of its business," a receiver may be

appointed. The regularity of the appointment of the receiver was questioned in an action brought by him. The court said:

> "the Court should, before appointing the receiver, have entered a final order or decree upon the merits, either dissolving the corporation or restraining it from the further continuance of its business."
>
> *Ward* v. *Farwell*, 97 Ill., 593, at p. 619.

Four years after making the original order restraining the company and appointing the receiver, the cause came on for hearing and a final order was then made perpetually enjoining the transaction of business and ratifying and confirming the appointment of the receiver.

> *Republic Life Ins. Co.* v. *Swigert*, 135 Ill., 150.

It is to be noted that under the contention of the respondent in this case, the Republic Life Insurance Company became dissolved within one year after the temporary restraining order was made under Section 3 of the Insurance Company dissolution act; that its corporate life was extended thereafter for two years under Section 4, and that accordingly it had become extinct for all purposes one year before the final decree, which if the respondent's contention is sound was, therefore, a nullity.

While, in *Ward* v. *Farwell* and *Republic Life Insurance Company* v. *Swigert*, *supra*, it was held that in an action by the Auditor the corporation might be deemed, in the absence of evidence to the contrary, to represent all stockholders, no such presumption can exist in an action brought by majority stockholders against the corporation, for

if the minority stockholders objected to dissolution then the corporation would be representing adverse parties and the majority stockholders could naturally control its action. Since a decree of dissolution can only be entered after notice to all parties in interest and a hearing had thereafter, and since, in *Evans* v. *Illinois Surety Co.*, 298 Ill., 101, it has been held that the minority stockholders and creditors of the corporation are parties interested who must receive such notice, it is clear that a decision depriving them of this hearing would be in violation of their constitutional rights.

POINT IV.

The authorities cited by the respondent are distinguishable.

None of these authorities in any way affect the question under consideration. They divide themselves into the following several classes:

(a) Authorities holding that actions abate upon dissolution of a corporation *for all purposes*, a proposition which we do not question.

Sturges v. *Vanderbilt*, 73 N. Y., 384;
Pendleton v. *Russell*, 144 U. S., 640;
Eagle Co. v. *Kelsey*, 23 Kans., 447;
Marion Co. v. *Perry*, 74 Fed., 425;
Merchants Loan Co. v. *Clare*, 107 N. Y., 663;
Morgan v. *N. Y. Nat. Bridge Assn.*, 73 Conn., 151;
Bank v. *Colby*, 88 U. S., 609.

(b) Authorities holding that despite formal

dissolution, statutes authorizing the bringing and defense of suits in the name of the corporation and providing for subsequent settlement of the corporate affairs do not cause pending actions to abate, which is, of course, our own proposition.

Sinnott v. *Hannan*, 214 N. Y., 454;
Malicki v. *Bulkley*, 107 Ill. App., 595.

(c) Authorities in which no question of abatement arose or was considered, and which therefore have no application.

Martyne v. *Amer. Ins. Co.*, 216 N. Y., 196,
Blanchard v. *Gay Co.*, 297 Ill., 421;
Yates v. *The People*, 207 Ill., 316;
Carr v. *Hamilton*, 129 U. S., 252,
Hollingshead v. *Woodward*, 107 N. Y., 97;
Logan v. *Greenwich Tea Co.*, 144 A. D., 372, Aff'd., 203 N. Y., 611;
Held v. *Crostwait*, 260 Fed., 613.

(d) Authorities in which courts of other states than Illinois have considered statutes somewhat similar to the Illinois statute and have arrived at results differing from those reached by the Illinois courts. These cases, of course, have no bearing on the determination of the Illinois law.

Shore Line R. R. Co. v. *Me. R. R. Co.*, 92 Me., 476;
Dundee Co. v. *Hughes*, 77 Fed., 855;
Thornton v. *Ry. Co.*, 123 Mass., 32.

So far as the last class hold that statutes extending corporate life for a fixed period for the purpose of bringing and defending suits, cause pending actions to abate at the expiration of the period, they are opposed not only to the Illinois decision in

Graham & Morton Trans. Co. v. *Owens*, 165 Ill. App., 100, but also to other State Court decisions relating to similar statutes.

Michigan State Bank v. *Gardner*, 15 Gray., 362;
Bewick v. *Alpena Imp. Harbor Co.*, 30 Mich., 700;
Franklin Bank v. *Cooper*, 36 Me., 179.

POINT V.

The decision in Evans v. Illinois Surety Co., 298 Ill., 101, is determinative of all questions involved on this appeal.

There is no doubt but that if the law as stated in the opinion in that case, from which no member of the court dissented, is the law of Illinois, it determines every point raised adversely to the respondent, who cites no Illinois decision at variance with it. On the authority of this decision we submit that the judgment below should be reversed.

All of which is respectfully submitted.

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